Supreme Court, U.S.
FILED

No. 09- 09 - 949 FEB 9 - 2010

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IN THE

Supreme Court of the United States

JOYCE K. MATSUO, SHARON WARREN, RONALD FRANKLIN, FRANK HARDT, RUSSELL HOLLAND, ROY MATSUO, MICHAEL MCCRARY, FRED NOLKE, CHARLES ROBERTS, RONALD SCHERLER, ROMAN BUYSON, PETER NEWMAN, THOMAS WARREN, JOHN J. KATO, AND MICHAEL C. SHEARER, on behalf of themselves and others similarly situated,

Petitioners,

v.

THE UNITED STATES, and the DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 9, 2010

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This case presents the important question of whether Congress may deny a significant benefit to a discrete class of individuals for no reason other than the identity of the state in which they reside. By enacting the Federal Employees' Pay Comparability Act of 1990, Congress provided locality-based comparability pay to Federal employees to reduce, and eventually eliminate, disparities between public and private sector compensation for employees performing similar work. This statute, however, excludes Federal employees who reside in Alaska and Hawaii from entitlement to locality pay solely and explicitly because of the identity of their state of residence. Congress provided no explanation or justification for this exclusion. Because locality pay is a significant benefit, and because it is incorporated into the salary used to calculate Federal employees' retirement benefits, the exclusion of Federal employees who reside in Alaska and Hawaii materially affects their right to travel among the fifty states by penalizing those who move to, and reside in, those two states, and by deterring others from moving to these states.

The questions presented here are:

1. Whether an Act of Congress that interferes with Petitioners' right to travel among the fifty states by penalizing Federal employees solely and explicitly because of the identity of the state in which they reside—*i.e.*, Alaska or Hawaii—is insulated from strict scrutiny or some higher level of review than rational basis merely because it imposes the same penalty upon all Federal employees within those two states where the Act does not similarly penalize Federal employees who reside in the other forty-eight states,

and where this Court has held that Federal laws interfering with the Constitutional right to travel are subject to a higher level of scrutiny.

2. Whether an Act of Congress that excludes individuals from entitlement to a significant benefit for no reason other than that they reside in a particular state violates their Constitutional right to Equal Protection under the laws, where Congress has provided no justification, compelling or otherwise, for their exclusion.

LIST OF PARTIES

Petitioners are Joyce K. Matsuo, Sharon Warren, Ronald Franklin, Frank Hardt, Russell Holland, Roy Matsuo, Michael McCrary, Fred Nolke, Charles Roberts, Ronald Scherler, Roman Buyson, Peter Newman, Thomas Warren, John J. Kato, and Michael C. Shearer, on behalf of themselves and others similarly situated.

Respondents are the United States of America and the Director of the Office of Personnel Management.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, reported at 586 F.3d 1180, is reprinted in the Appendix ("App.") at 58a. The decisions of the United States District Court for the District of Hawaii, reported at 416 F.Supp.2d 982

and 532 F.Supp.2d 1238, are reprinted in the Appendix at 1a and 30a.

JURISDICTION

The Court of Appeals judgment was entered on November 12, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent Constitutional, statutory and regulatory provisions are reproduced in the Appendix, beginning at 67a.

STATEMENT

This case involves an important issue of first impression: whether Congress is prohibited by the Constitution from depriving certain United States citizens of a significant benefit or privilege based solely and explicitly on the identity of the state in which they reside, where it has been established that the Congressional statute at issue materially affects their right to travel among the fifty states, and where Congress has not provided any explanation or justification for the exclusion.

I. THE RIGHT TO TRAVEL

This Court has long recognized that all citizens should be free to travel among the states "uninhibited by states, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1960). Indeed, this Court has held that this right is "so important" that it is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Saenz v. Roe*, 526 U.S. 489, 495 (1999).

The "textual source of the constitutional right to travel . . . has proved elusive." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986). The origin of the right has been assigned to the Privileges and Immunities Clause of Art. IV, to the Commerce Clause, and to the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* It has also been noted that the right to travel "achieves its most forceful expression in the context of equal protection analysis." *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring).

Regardless of its source, the right to travel must be respected by both the states and by Congress when enacting legislation. In *Saenz*, this Court struck down a Federal statute authorizing the California welfare system's reliance on length of residency in determining benefit levels, stating that "the protection afforded to the citizen by the Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States." *Saenz*, 526 U.S. at 507-08. As this Court succinctly stated:

> Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle 'that they may not be exercised in a way that violates other specific provisions of the Constitution.' . . . *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). . . . 'Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.'. . . . *Mississippi*

Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982).

Id. at 508 (some internal citations omitted); *see also Kent v. Dulles*, 357 U.S. 116, 125-27 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964). Thus, just as the Fourteenth Amendment's guarantee of equal protection under State law has been incorporated against the Federal government through the Fifth Amendment Due Process Clause, so its protection against State discrimination based on State of residency is incorporated against the Federal government.[1]

A law violates the Constitutional right to interstate travel when it "actually deters such travel" or when it uses "any classification which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 903. A classification that has "the effect of imposing a penalty on the exercise of the right to travel violates the Equal Protection Clause 'unless shown to be necessary to promote a compelling governmental interest.'" *Saenz*, 526 U.S. at 499 (quoting *Shapiro*, 394 U.S. at 634); *see also Soto-Lopez*, 476 U.S. at 904 n.4 ("Of course, regardless of the label we place on our analysis—the right to migrate or equal protection—

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[1] Professor Laurence Tribe has reached the same conclusion, stating: "it was important to the *Saenz* court to add that 'the protection afforded to the citizen by the Citizenship Clause of the [Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States'" because, "[u]nless that congressional measure violated some right protected by the Constitution from abridgement by Congress, or some structural principle binding on Congress, it would necessarily validate what California had done." Laurence H. Tribe, "*Saenz Sans Prophecy: Does the Privileges and Immunities Revival Portent the Future—or Reveal the Structure of the Present?*," 113 Harv. L. Rev. 110, 128 (1999).

once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.").

II. THE FEDERAL EMPLOYEES' PAY COMPARABILITY ACT

Congress enacted the Federal Employees' Pay Comparability Act ("FEPCA" or "the Act") in 1990, and the Act was implemented in 1994. The Congressional policies behind the Act are to ensure that Federal employees receive "equal pay for substantially equal work within each local pay area"; to ensure that Federal employees' pay is "comparable with non-Federal pay rates for the same levels of work"; and to "completely" eliminate any "existing pay disparities between Federal and non-Federal employees." 5 U.S.C. §§ 5301, 5304(a)(3).

FEPCA provides a mechanism for adjusting the annual pay of most Federal employees so that it more closely approximates the pay received by private sector employees who perform comparable work. The Act accomplishes this by requiring that comparability payments "shall be payable within each locality determined to have a pay disparity greater than 5 percent." *Id.* § 5304(a)(1). The Act provides, however, that Federal employees "outside the continental United States, as defined in section 5701(6)," are not to be included in a pay locality. *Id.* § 5304(f)(1)(A). Section 5701(6), in turn, defines the continental United States as "the several States and the District of Columbia, but does not include Alaska or Hawaii." *Nothing* in the statute or its legislative history explains why Alaska and Hawaii are explicitly excluded from the locality pay program.

Comparability payments under FEPCA are "considered to be part of basic pay for purposes of retirement." *Id.* § 5304(c)(2)(A). Federal employees' retirement benefits are based, in large part, on the average of their three highest consecutive years' basic pay. Because locality pay is a significant salary benefit, and because it is incorporated into the salary used to calculate overtime pay and thrift savings retirement benefits, including government matching of funds for retirement benefits, it enhances Federal employees' retirement benefits as well as their annual income. *Id.* §§ 8331(4) & 8339. The exclusion of Federal employees who reside in Alaska and Hawaii from receipt of this benefit materially affects their right to travel among the fifty states by penalizing those who move to and reside in those two states, and by deterring others from moving to these states.

Locality pay for Federal employees covered by the statute is determined annually by comparing the General Schedule pay rates for Federal employees with the pay rates of non-Federal employees performing the same type of work within a pay locality. *Id.* § 5304(d)(1). This comparison is based on surveys conducted by the Bureau of Labor Statistics ("BLS"). *Id.* There are currently 32 locality payment areas for which comparability payment levels have been established. 5 C.F.R. §§ 531.603 & 531.604. All but one of these are specific areas of the United States, and the 32nd is designated as the "Rest of U.S." ("RUS") and consists of those portions of the "continental United States" that do not fall within any of the other 31 locality pay areas. *Id.*[2] In 2007, the comparability payment level for RUS was 12.64

[2] Of course, the phrase "Rest of U.S." is a misnomer because Hawaii and Alaska are excluded.

percent of base pay; the levels for the other 31 areas ranged from 13 percent for "Indianapolis-Anderson-Columbus, Indiana" to 30.33 percent for "San Jose-San Francisco-Oakland, California." Exec. Order No. 13,420, 71 Fed. Reg. 77,571, 77,580 (Dec. 26, 2006).

Federal workers in the RUS received locality pay in 2007 even though BLS had not surveyed all of the areas included within that payment area. As a result, *every single Federal employee in the 48 states* received locality pay paid, at a minimum, at the RUS rate. In contrast, Federal employees in Alaska and Hawaii who work in the same or similar job classifications at the identical GS level of base pay, with identical job titles and performing *identical* work, received *no* locality pay.

III. THE DISTRICT COURT'S DECISION

The instant case was filed in the United States District Court for the District of Hawaii by Federal employees who work, or formerly worked, in Alaska or Hawaii and who as a result do not, or did not, receive locality pay. Two classes of plaintiffs were certified by the District Court. The first consists of all Federal employees employed in the contiguous United States who receive locality pay and who cannot reside in Alaska or Hawaii without losing their locality pay. The second consists of all current or former Federal employees employed in Alaska or Hawaii who are ineligible to receive locality pay because they do not reside in the 48 states. App. 31a.

In their Complaint, the Petitioners alleged, *inter alia*, that FEPCA's exclusion of Federal employees living in Alaska and Hawaii constitutes an unconstitutional restriction in violation of the Equal Protection Clause of the Fifth Amendment to the United

States Constitution. *Id.* On January 30, 2008, the District Court issued a decision granting Respondents' motion for summary judgment.

The District Court found that, because "FEPCA on its face distinguishes between federal employees in Hawaii and Alaska and [continental United States] federal employees, and results in Hawaii and Alaska employees being treated differently in terms of not receiving locality pay with the attendant effects on retirement contributions and annuities," the Petitioners had demonstrated that FEPCA triggers equal protection review. *Id.* at 43a. Citing *Saenz*, 526 U.S. at 507-08, the court also agreed with the Petitioners that the fundamental right to travel "limits the national government's powers." App. at 45a ("it would be anomalous if the national government was prohibited from empowering the several states to interfere with the right to travel but it could impair the right itself directly."). Moreover, the court found that FEPCA's exclusion "has influenced federal employees' decisions about whether to move from these states to [the continental United States] to receive locality pay." *Id.* at 34a.

Notwithstanding the foregoing, the District Court concluded that Petitioners had not demonstrated that FEPCA implicated the right to travel "sufficiently to trigger strict scrutiny review." *Id.* at 46a. Specifically, it held that Petitioners' challenge to FEPCA did not fit within any of the three aspects of interstate travel recognized by this Court in *Saenz*, 526 U.S. at 500.[3] *Id.* It further concluded that, "[e]ven if the

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[3] In *Saenz*, this Court, applying the Constitutional right to travel to a state, and not a federal, statute, held that the right embraces "at least three different components. It protects the right of a citizen of one State to enter and to leave another

right to travel's contours extend beyond these three components," *id.* at 47a, FEPCA did not offend this Constitutional right because it is not the act of traveling that triggers FEPCA's exclusion, and because this Court, in *Califano v. Torres*, 435 U.S. 1 (1978), "rejected the proposition that the right to interstate travel includes the right to receive the same level of benefits in the citizen's new state as the citizen enjoyed in the former state of residence." *Id.* at 48a.

The District Court therefore applied only a rational basis review to FEPCA. *Id.* at 50a. Significantly, in applying this analysis, the court rejected each of the Respondents' purported rationales for FEPCA's exclusion of Federal employees in Alaska and Hawaii. For instance, with respect to Respondents' argument that Congress "rationally could have decided Hawaii and Alaska employees did not need locality pay because they received tax-free COLAs," *id.* at 51a, the court conceded that it was "puzzled by the legislative anomaly that here operates to the lifelong disadvantage of federal employees in the excluded states," insofar as the statute "does not state that it will exclude from its coverage any pay locality eligible for COLA" but rather "it excludes Hawaii and Alaska by name." *Id.* at 52a.

The court also noted that, because Hawaii and Alaska federal employees have received COLA's "since the 1940s, long before FEPCA's enactment, due to increased living costs," and the COLA is aimed at ensuring that those employees have comparable

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State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz*, 526 U.S. at 500.

buying power as Federal employees in Washington, D.C., the enactment of FEPCA "gives federal employees in Washington D.C. an additional supplement to base pay in the form of locality pay that it does not give to federal employees in Hawaii and Alaska." *Id.* at 52a-53a. The court found that this "historical context calls into question Defendants' argument that COLA is a tradeoff for FEPCA's locality pay." *Id.* at 53a.

The court also rejected the Respondents' other purported rationales for the exclusion, concluding that "federal employees' state of residence bears no rational relationship to excluding them from locality pay to conserve the public fisc," and that the Respondents had not "adequately explain[ed] what they mean in arguing Congress could have been motivated by 'legislative convenience' in the context of this case." *Id.* at 53a. Despite its rejection of the Respondents' purported rationales, the court concluded that Petitioners had not met their burden of overcoming the presumption that FEPCA was constitutional because "Congress has a legitimate interest in creating and managing compensation packages for its employees," and because Congress rationally could have decided employees who received COLA pay allowances did not also need to receive locality pay. *Id.* at 54a.

The District Court found this to be the case "even if it has turned out, in practice, that FEPCA's exclusion has worked to the disadvantage of Hawaii and Alaska employees with respect to their retirement benefits." *Id.* at 55a. It also found that Congress "may" have determined that locality pay was not needed in these states to recruit and retain employees. *Id.* at 56a. The court reached this conclusion despite its finding

that the "legislative history is silent as to why Congress chose to exclude Hawaii and Alaska employees from receiving locality pay," *id.* at 34a, and despite the lack of any evidence in the record demonstrating that such a determination was ever made. *Id.* at 56a.

IV. APPEAL TO THE NINTH CIRCUIT

In their appeal to the Ninth Circuit Court of Appeals, Petitioners argued that the District Court erred by mechanically applying the analysis in *Saenz,* which is designed for analyzing right-to-travel challenges to *state* statutes, to a *federal* law that discriminates against United States citizens solely because they reside in particular states. Petitioners also argued that the District Court erred under equal protection analysis by failing to apply a higher level of scrutiny than rational basis review to FEPCA's exclusion, which was unique in discriminating against residents of Hawaii and Alaska based solely on the identity of the state in which they reside.

On November 12, 2009, the Ninth Circuit affirmed the District Court's ruling. At the outset of its decision, the court held that Petitioners who are now working in Alaska and Hawaii lack standing to bring a right to travel claim because "the Act doesn't [sic] affect their 'freedom to leave' Alaska or Hawaii." *Id.* at 62a. The court did, however, agree with Petitioners that Federal employees who work in the forty-eight contiguous states would lose locality pay if they moved to Alaska or Hawaii and continued to work for the federal government, "so traveling would arguably trigger a penalty." *Id.* Nevertheless, the court concluded that these Petitioners had not demonstrated that FEPCA's exclusion burdened their fundamental right to travel.

In reaching this conclusion, the court applied the three-part test in *Saenz*, and concluded that because "the states aren't [sic] involved here at all, . . . the Act doesn't [sic] violate the right to travel as defined by *Saenz*." *Id.* at 63a. The court also held that, because this Court held in *Torres* that "the right to travel permits the federal government to put new migrants to a state or territory on the same footing as that of long-established citizens," Petitioners moving to Alaska or Hawaii could not demonstrate interference with their right to travel where "all federal employees in Alaska and Hawaii are denied locality pay." *Id.* at 65a. Finally, the court rejected the Petitioners' argument that a higher level of scrutiny must apply to the unique discriminatory basis afforded under FEPCA based purely on the identity of the state in which one resides, finding that Petitioners had "abandoned" that claim, and because there is not otherwise a "free-floating requirement that all congressional action be rational." *Id.* at 66a.[4]

REASONS FOR GRANTING THE PETITION

I. THE PROTECTION AFFORDED TO FEDERAL CITIZENS BY THE CITIZENSHIP CLAUSE IS A FUNDAMENTAL RIGHT THAT MUST BE REAFFIRMED BY THIS COURT

Certiorari review of this case is necessary to resolve the fundamentally important question of whether Congress, without a compelling justification

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[4] The court also concluded, however, that even if it were to construe Petitioners' briefing to have raised an equal protection claim, "the Act clearly satisfies rational-basis scrutiny for the reasons stated by the district court." *Id.* at 66a n.8. The Court of Appeals devoted no other analysis to this argument.

beyond rational basis, may single out the residents of two particular states and deny them benefits that are provided to residents of the other forty-eight states based on nothing more than the identity of the state in which they reside. The courts below found that the Petitioners' Constitutional rights were not implicated by such an action because FEPCA's exclusion did not discriminate against residents *within* any particular state. In other words, the courts held that, because no one in Hawaii or Alaska receives locality pay, the Act did not interfere with Petitioners' Constitutional right to travel among the states or to equal protection under the laws, *despite* a finding by the District Court that FEPCA's exclusion of Alaska and Hawaii residents penalized them for traveling to, and residing in, these states, and that Respondents had not articulated any reasonable basis for this exclusion. Unless this Court corrects this misapplication of the Constitution, Congress will be free to enact legislation that penalizes citizens of the United States for no apparent reason other than their decision to reside in a particular state. Such an outcome is fundamentally at odds with the concept of Federal citizenship, and eviscerates this Court's prior ruling that Congress is obligated to respect the Constitutional right to travel.

The flaw in the lower courts' reasoning arises first from the notion that a rational basis analysis is sufficient to determine whether Congressional discrimination based on state identity violates equal protection. Neither court considered whether the unique discriminatory basis on which Congress denies benefits under FEPCA justifies a higher level of scrutiny than that applied to other laws. The District Court analyzed the Government's purported justifications for the statute and found them lacking under any

analysis other than rational basis—and all but one rationale failed to even meet this standard—yet failed to consider that discrimination based on state residence should justify at least some form of intermediate scrutiny requiring Congress to at least provide a justification in its legislation singling out citizens for denial of benefits exclusively because of the state in which they reside.

Indeed, if the Ninth Circuit's refusal to apply meaningful Constitutional scrutiny to FEPCA is left undisturbed, Congress would be free to deny a host of Federal benefits to Federal citizens based *solely* on the identity of the state in which they resided. For instance, Congress could permit a tax credit for dependent children among forty-nine of the fifty states—even while expressly stating in the statute that the purpose of the credit was to assist families in providing for their children—but withhold, *without explanation*, such a credit from families residing in the state of Mississippi. Such a provision would clearly impact Federal citizens' decisions whether to move to or from Mississippi, and would penalize those who moved to, and resided in, that state. Moreover, this exclusion could have arisen from nothing more than political expediency—for instance, the need to cut Federal costs—and the Congressional representatives of the targeted state would be powerless to prevent the outcome. But under the Ninth Circuit's analysis, such an outcome would be constitutionally permissible, and the right to travel would not be implicated, because this was not a *state* statute, and because all Mississippi residents would be deprived of the tax credit regardless of how long they lived in the state. Surely, the Constitution cannot permit Congress to mete out the benefits of

Federal citizenship by drawing lines among the states in such a way.

The failure by Congress to provide locality pay to Federal employees solely because they reside in Alaska or Hawaii is inconsistent with our Federal structure as a union of fifty states and the concept of Federal citizenship of the United States. Just as this Court has held that individual states may not create subclasses of citizens within their boundaries and accord less favorable treatment to some subclasses than others, so the Federal government should not be able to create subclasses of Federal citizens simply based upon the states in which they reside. Because the Ninth Circuit's decision allows this very result, only this Court can provide the clarity necessary to avoid this outcome.

The lower courts' analysis also fails due to their rote application to a Federal statute of the three-part test in *Saenz*, which by its own terms involved a Constitutional challenge to a *state* law. The Ninth Circuit devoted little attention to this analysis, concluding simply that FEPCA's exclusion did not violate the right to travel as defined by *Saenz* because "the states have no role in determining the compensation of federal employees." App. 63a. This reasoning completely ignores that FEPCA's exclusion directly interferes with the Petitioners' right to travel, and ignores this Court's conclusion in *Saenz* that the Constitutional right to travel is protected against incursion from acts of Congress as well as the states.

II. FEPCA'S EXCLUSION OF FEDERAL CITIZENS FROM A SIGNIFICANT BENEFIT SOLELY BECAUSE THEY RESIDE IN A PARTICULAR STATE VIOLATES PETITIONERS' CONSTITUTIONAL RIGHT TO TRAVEL

The Ninth Circuit erred by mechanically applying the analysis used in *Saenz* to conclude that FEPCA's denial of locality pay to Federal employees residing in Alaska and Hawaii did not infringe upon Petitioners' Constitutional right to travel. At the outset, this Court has repeatedly emphasized the importance of the right of free interstate movement to the concept of the nation as a union of states. *See, e.g., Saenz*, 526 U.S. at 511 ("The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'") (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)); *see also Shapiro*, 294 U.S. at 629-30 ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.") (quoting *Passenger Cases*, 7 How. 283, 293 (1849)); *id.* at 630 ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union . . . . [A] right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.") (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

This Court has also unequivocally held that Congress may not offend the Constitutional right to travel in enacting Federal legislation, and the District Court in this case explicitly found that FEPCA's exclusion of Federal employees residing in Hawaii and Alaska influenced Petitioners' decisions to travel to and from the excluded states—a factual finding that the Respondents did not dispute. Notwithstanding the foregoing, the Circuit Court held that FEPCA's exclusion was not subject to strict scrutiny because: (1) such a finding would make it "quite hard" for Congress to "tax airports, hotels, moving companies or anything else involved in interstate movement" (App. 63a); (2) the "states aren't [sic] involved here at all, so the Act doesn't [sic] violate the right to travel as defined by *Saenz*" (*id.*); and (3) the exclusion was consistent with the Congressional action upheld against a right to travel challenge by this Court in *Califano v. Torres*, 435 U.S. 1 (1978). *Id.* at 65a. The court also held that the class of Petitioners who reside in Alaska and Hawaii lack standing to bring a right-to-travel claim. Each of these conclusions is erroneous.

The Ninth Circuit's concern that subjecting FEPCA's exclusion to strict scrutiny would jeopardize Congress's ability to tax airports, hotels or "anything else involved in interstate movement" is entirely misplaced. In *Evansville-Vanderburgh Airport Authority v. Delta Airlines*, 405 U.S. 707 (1972), *superceded by statute*, Airport Development Acceleration Act of 1973, Pub. L. No 93-44, 87 Stat. 90, *as recognized in Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 9-10 (1983), this Court specifically rejected the argument that a tax imposed on interstate airline travelers unconstitutionally burdened their right to travel. Indeed, the Court held that

"[t]he principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest *has no application* in this context" because the tax was designed to fund a facility that "aids rather than hinders the right to travel." *Id.* at 714 (emphasis added). By contrast, FEPCA's exclusion of Alaska and Hawaii residents could in no way be said to aid the right to travel. Accordingly, the Ninth Circuit's concern that subjecting FEPCA's exclusion to strict scrutiny would jeopardize Congress's ability to tax airports, airlines, hotels or other implements of interstate travel is unfounded.

The Ninth Circuit also erred by concluding that strict scrutiny was not appropriate merely because the states were not involved in enacting FEPCA. As noted, this conclusion contradicts the holding in *Saenz* that the Constitutional right to travel may not be infringed by either state or *federal* enactments. While the *Saenz* decision did set forth "three recognized components" of the right to travel as applied to the states, it never purported to provide an exhaustive or final list of the ways the right could be violated. *See Saenz*, 526 U.S. at 500 ("[t]he right to travel discussed in our cases embraces *at least* three different components") (emphasis added). It certainly cannot be said that the holding in *Saenz* precludes a finding that Congress violated Petitioners' right to travel merely because the states were not involved in enacting FEPCA.

The Ninth Circuit's conclusion that Petitioners' claim is foreclosed by this Court's decision in *Torres* is also incorrect. In *Torres*, *supra*, this Court, in a brief *per curiam* decision, rejected a constitutional challenge to a statute providing Supplemental Secu-

rity Income ("SSI") benefits to residents of the United States, but not to residents of the territory of Puerto Rico. The *Torres* decision, however, does not defeat the Petitioners' arguments that the FEPCA exclusion offends their Constitutional rights, for the simple reason that the decision dealt with Congressional treatment of Puerto Rico and not one of the fifty states. As the Court noted in *Torres*, "Congress has the power to treat Puerto Rico differently" since "Puerto Rico has a relationship to the United States 'that has no parallel in our history.'" *Torres*, 435 U.S. at 3 n.4 (quoting *Examining Board v. Flores de Otero*, 426 U.S. 572, 596 (1976)). Moreover, neither Puerto Rico nor its residents have the same constitutional rights as States and State residents. *See Harris v. Rosario*, 446 U.S. 651, 651 (1980) ("Congress, which is empowered under the Territory Clause of the Constitution, U.S. Const. Art. IV, §3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions."). Insofar as Puerto Rico occupies a legal status materially different from that of a State, the Court's rejection of a Constitutional challenge in *Torres* does not compel that the same conclusion be reached in this case.

Finally, the Ninth Circuit erred by concluding that Federal employees who now reside in Alaska and Hawaii lack standing to bring a right-to-travel claim. The court based its conclusion upon its finding that the Act does not affect these Petitioners' "freedom to leave" Alaska or Hawaii, but instead penalizes them for remaining in their home state. This holding is inconsistent with this Court's rulings in cases addressing the Constitutional right to travel, and has the perverse effect of denying those who are most

severely punished by an unconstitutional law the standing to challenge the law on constitutional grounds.

For instance, in *Soto-Lopez*, *supra*, the plaintiffs successfully challenged a New York statute that granted preference in civil service employment opportunities to veterans who were residents of New York when they entered the service. As with the class of Petitioners who currently reside in Alaska and Hawaii, the plaintiffs in *Soto-Lopez* were long-time residents of the state in which they suffered the deprivation, and the statute they challenged did not affect their "freedom to leave" their home state. This Court nevertheless found in favor of their right-to-travel claim because the challenged statute penalized them for the timing of their migration to New York. *Soto-Lopez*, 476 U.S. at 911.

Similarly, the *Saenz* case was brought by three individuals who had recently moved to California and alleged that they were penalized by that state's law that denied benefits to recent migrants to the state. As with the Petitioners who reside in Alaska and Hawaii, none of the plaintiffs in *Saenz* could allege that the challenged statute affected their "freedom to leave" their home state, but they clearly had standing to challenge the statute simply by demonstrating that they were harmed by its application. It would be an odd outcome indeed if those who are most severely punished by an unconstitutional statute—in this case, the residents of the states specifically excluded from the Federal benefit—were denied standing to challenge the statute merely because it did not hinder them from leaving their home state in order to escape its adverse, and unconstitutional, impact.

Based upon the foregoing, Petitioners respectfully submit that FEPCA's exclusion of Federal employees from receiving locality pay solely because they reside in Alaska and Hawaii must be subject to strict scrutiny pursuant to this Court's decision in *Saenz*. Absent a ruling by this Court that Congressional enactments burdening the right to travel are subject to meaningful Constitutional scrutiny, Congress will be free to enact future legislation that penalizes Federal citizens solely because they choose to reside in a particular state.

III. FEPCA'S EXCLUSION OF FEDERAL EMPLOYEES FROM A SIGNIFICANT BENEFIT SOLELY BECAUSE THEY RESIDE IN PARTICULAR STATES VIOLATES PETITIONERS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAWS

Even if the Ninth Circuit did not err by concluding that FEPCA is not subject to strict scrutiny by virtue of a right-to-travel analysis, its failure to apply any meaningful review of FEPCA's exclusion under the Equal Protection Clause demands the attention of this Court. In their Complaint, the Petitioners alleged that FEPCA's exclusion of Federal employees living in Alaska and Hawaii violated their right to equal protection under the Fifth Amendment to the United States Constitution, and the District Court found that Petitioners had demonstrated that FEPCA triggered equal protection review, albeit under a rational basis standard. Moreover, in their appeal to the Ninth Circuit, Petitioners explicitly challenged the District Court's application of the rational basis test to their claims, and argued in their briefs that the statute offended the Equal Protection

clause, requiring a higher level of scrutiny than rational basis. *See, e.g.*, Brief of Appellants at 22 ("Consequently, just as the Privileges and Immunities Clause of the Fourteenth Amendment and the Equal Protection Clause, through the well-established constitutional right to travel, forbid States from creating disfavored subclasses of State citizens based on length of residency, so does it forbid the Federal government from distinguishing among subclasses of Federal citizens based on the State in which they reside and treating some of those citizens less favorably than others."); *see also* Reply Brief of Appellants at 2 ("As the employees demonstrated in their opening brief, the federal government has an obligation of equal protection that extends throughout all 50 states.").

Notwithstanding the foregoing, the Ninth Circuit inexplicably concluded that the Petitioners had abandoned this claim, and therefore refused to consider any of the Petitioners' arguments that the FEPCA exclusion would not survive rational basis scrutiny. App. 66a n.8 (holding that the Petitioners "don't [sic] claim that the Act's classification of employees based on the state in which they work is itself a denial of equal protection; they only claim this classification impermissibly burdens their right to travel," and that a "claim based on the right to travel is distinct from an equal protection claim."). The Ninth Circuit devoted a single sentence, with no supporting analysis, to rejecting the Petitioners' argument that the District Court erred as a matter of law in concluding that Respondents had satisfied the rational basis test, notwithstanding the fact that the District Court had rejected each of the Respondent's purported rationales for the exclusion of Federal employees residing in Alaska and Hawaii.

The Circuit Court erred by concluding that the Act "clearly satisfies rational-basis scrutiny for the reasons stated by the district court." *Id.* The District Court admitted that it was "puzzled by the legislative anomaly that here operates to the life-long disadvantage of federal employees in" Alaska and Hawaii, and found none of the Government's proffered rationales for that anomaly persuasive. *Id.* at 52a. The court nevertheless sustained the statute under an extremely deferential minimum rationality standard, believing it was obligated to uphold the exclusion "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 54a (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). In addition, the District Court erroneously placed upon the Petitioners the impossible burden of proving that no such conceivable state of facts could exist. *Id.* at 56a.

The Ninth Circuit's affirmation of these conclusions was plainly wrong. In cases where this Court has applied a rational basis test to residency-based statutes, it has imposed a test that is far less deferential to the test fashioned by the District Court. For instance, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court struck down a New Mexico statute awarding tax benefits based on residency at a particular past point in time under a minimum rationality test, because the purported purpose—encouraging veterans to move to the state—bore no rational relationship to the distinctions drawn by the statute, which implemented a cut-off date for entitlement to benefits that had already passed. *Id.* at 618-23. Similarly, in *Zobel*, this Court struck down a statute awarding benefits derived from mineral income dividends based on the duration of residency because "Alaska has shown no valid state

interests which are rationally served by the distinction it makes." *Zobel*, 457 U.S. at 60-65.

When the standard of review of *Hooper* and *Zobel* is properly applied, it is clear that the lower court's application of the rational basis test was in error. After rejecting the Respondents' purported rationale for the exclusion, the District Court held that Congress could have decided employees who receive COLA pay allowances did not also need to receive locality pay, and that Congress may have determined that locality pay was not needed in Alaska and Hawaii to recruit and retain employees. These findings, however, are squarely inconsistent with Congress's declared reason for providing locality pay: to ensure public-private wage equity. 5 U.S.C. §5301. Where Congress has declared its purpose, it is irrational to suggest that Federal employees in Alaska and Hawaii were excluded from locality pay because they received COLA allowances to address the cost of living in those States. As noted by the District Court itself, these two pay supplements "are aimed at remedying different compensation issues, and are calculated differently as well." App. 53a.

The Ninth Circuit's cursory affirmation of this reasoning ignores this Court's holdings in *Bernalillo* and *Zobel*. Indeed, in *Zobel*, this Court struck down the statute at issue because its classifications were not rationally related to its declared purpose. *Zobel*, 457 U.S. at 61-62. As the Court explained in *Zobel*, where the purposes of a statute are expressly stated, "we need not speculate as to the objectives of the legislature." *Id.* at 61 n.7. Because FEPCA's exclusion of Federal employees residing in Alaska and Hawaii does not survive even rational basis scrutiny,

the Ninth Circuit's ruling to the contrary should be reversed.

CONCLUSION

By failing to subject the exclusion of Federal employees who reside in Alaska and Hawaii to any meaningful scrutiny—much less the strict scrutiny that is appropriate for statutes interfering with the Constitutional right to travel—the lower courts' decisions in this case leave open a glaring hole in the Constitutional protection that gives meaning to Federal citizenship. If the Ninth Circuit's decision is left unaddressed, Congress will be free to enact legislation that excludes certain Federal citizens from important Federal benefits or privileges *for no reason* other than the fact that they reside in a particular state. Certiorari review should be granted to prevent such an outcome.

Respectfully submitted,

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February 9, 2010

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 05-00398 PMP-LEK

JOYCE MATSUO; SHARON WARREN; RONALD FRANKLIN; FRANK HARDT; RUSSELL HOLLAND; ROY MATSUO; MICHAEL MCCRARY; FRED NOLKE; CHARLES ROBERTS; RONALD SCHERLER; ROMAN BUYSON; PETER NEWMAN; THOMAS WARREN; JOHN J. KATO; and MICHAEL C. SHEARER, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

THE UNITED STATES, and LINDA M. SPRINGER, Director, Office of Personnel Management,

Defendants.

ORDER DENYING MOTION TO DISMISS OR TRANSFER

This is a proposed class action challenging the constitutionality of the Federal Employees Pay Comparability Act of 1990 ("FEPCA"), which provides locality-based comparability pay to federal employees. Plaintiffs are former or current federal employees, some of whom have worked in Hawaii and Alaska. (First Am. Compl. (Doc. #7) ¶¶ 1-16.) They accurately allege FEPCA applies only to federal employees within the contiguous United States, thus excluding federal employees in Hawaii and Alaska from

receiving locality pay.[1] (*Id.* ¶¶ 24(a), 34.) Plaintiffs further allege that although Hawaii and Alaska federal employees receive a cost of living adjustment ("COLA") as part of their pay, Defendant United States does not include the COLA payments in calculating their retirement benefits. (*Id.* ¶ 24(c).)

Plaintiffs claim the locality pay exclusion for Hawaiian and Alaskan federal employees is based on residence and therefore unconstitutionally restricts interstate travel in violation of the equal protection clause of the Fifth Amendment to the United States Constitution (Count 1). (*Id.* ¶¶ 32-35.) Plaintiffs also claim federal employees have a property interest in their salary and FEPCA's arbitrary exclusion of Hawaiian and Alaskan federal employees from receiving locality pay and the United States' failure to include COLA payments in their retirement calculation violate substantive due process under the Fifth Amendment (Counts 2 and 3). (*Id.* ¶¶ 36-41.) Finally, Plaintiffs assert a claim under the Administrative Procedures Act ("APA"), alleging the Office of Personnel Management's ("OPM") decision not to include COLA payments as "basic pay" for retirement calculations for Alaskan and Hawaiian employees is an arbitrary and capricious interpretation of retirement statutes (Count 4). (*Id.* ¶¶ 42-43.)

Plaintiffs propose to represent two classes. The first class includes all federal employees in the contiguous United States who are entitled to locality pay

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[1] FEPCA provides that "each General Schedule position (excluding any outside the continental United States, as defined in section 5701(6)) shall be included with a pay locality." 5 U.S.C. § 5304(f)(1)(A). Section 5701(6) defines "continental United States" as "the several States and the District of Columbia, but does not include Alaska or Hawaii." 5 U.S.C. § 5701(6).

under FEPCA who cannot reside in Alaska or Hawaii and work for the United States without losing locality pay. (*Id.* ¶ 23(a).) The second class consists of federal employees residing in Hawaii and Alaska who are not eligible for locality pay and do not have COLAs included in their retirement pay calculations. (*Id.* ¶ 24(b).) Plaintiffs seek declaratory and injunctive relief, damages for constitutional rights violations, and back pay under the Back Pay Act, 5 U.S.C. § 5596. (*Id.* ¶¶ 44-46.)

Presently before the Court is Defendants" Motion to Dismiss or, in the Alternative, to Transfer (Doc. #8), filed on August 17, 2005. Plaintiffs filed an Opposition (Doc. #13) on September 23, 2005. Defendants filed a Reply (Doc. #24) on October 27, 2005. With leave of the Court, Plaintiffs filed a Surreply (Doc. #26) on November 21, 2005. The Court held a hearing on this matter on January 31, 2006 (Doc. #28).

Defendants contend this Court lacks jurisdiction because sovereign immunity bars Plaintiffs" claims unless those claims are brought under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), which waives the United States" sovereign immunity for suits brought in federal district court, but only for claims under $10,000. Defendants assert a preliminary review of the named Plaintiffs" personnel records suggests fourteen of them would have back pay claims worth over $10,000 if Plaintiffs prevail. Additionally, Defendants estimate nearly half the putative class of Alaskan and Hawaiian federal employees also would have claims over $10,000. Defendants further argue the APA is not an applicable waiver of sovereign immunity in this case because the APA's waiver is limited to suits seeking only non-monetary relief, and

does not apply where there is an alternative adequate remedy, which Defendants insist exists and is available in the form of a claim under the Tucker Act before the Court of Federal Claims.[2]

Defendants also argue venue is improper in this Court because under 28 U.S.C. § 1402, which governs suits against the United States brought under § 1346(a), venue is proper only in the judicial district in which the plaintiff resides. Here, note Defendants, only five of the named Plaintiffs reside in Hawaii and the entirety of one class proposed by Plaintiffs resides in the contiguous United States. Defendants contend this Court should transfer the action to the Court of Claims which would have jurisdiction under the Big Tucker Act, 28 U.S.C. § 1491, which would not limit the dollar amount of a plaintiff's claims, or pose the venue difficulty Defendants contend exists in this Court.

Finally, Defendants argue that Plaintiff's COLA claims must be dismissed because they are subject to exclusive review provisions in the Civil Service Retirement Act ("CSRA") and Federal Employees Retirement System Act ("FERSA").

I. LOCALITY PAY CLAIMS

A. Governing Law

The United States Court of Appeals for the Federal Circuit has "exclusive jurisdiction of an appeal from an interlocutory order of a district court . . .

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[2] "The Court of Federal Claims is an Article I trial court of limited jurisdiction that was created by Congress as a forum where private parties could sue the government for money claims, other than those sounding in tort, where the claims would otherwise be barred by sovereign immunity." *Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994).

granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under [28 U.S.C. §] 163 1." 28 U.S.C. § 1292(d)(4)(A); *see also Christopher Village, L.P. v. U.S.*, 360 F.3d 1319, 1328 (Fed. Cir. 2004). Under § 1631 , where a court finds it has no jurisdiction over an action, "the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action or appeal could have been brought at the time it was filed." 28 U.S.C. § 1631. Accordingly, Federal Circuit law guides this Court on the question of whether this Court or the Court of Claims has jurisdiction over this action and the Federal Circuit has exclusive jurisdiction over an appeal of this Court's Order.

B. Jurisdiction

The United States, as a sovereign, is immune from suit unless it has waived its immunity. *Ins. Co. of the W. v. United States*, 243 F.3d 1367, 1372 (Fed. Cir. 2001). Sovereign immunity is a jurisdictional bar if the United States has not consented to be sued on a particular claim. *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998). The United States must express unequivocally its waiver of sovereign immunity, and the terms of the waiver define the court's jurisdiction. *Id.*; *Ins. Co. of the W.*, 243 F.3d at 1372. A party bringing an action against the United States bears the burden of demonstrating an unequivocal waiver of immunity. *Booth v. United States*, 990 F.2d 617, 619 (Fed. Cir. 1993).

Defendants argue this Court has no jurisdiction over this action because the United States has not waived its sovereign immunity for Plaintiffs' claims. Defendants argue the United States has waived its sovereign immunity for damages claims over $10,000

only if the claim is brought in the Court of Claims. Defendants contend that although Plaintiffs style their claims as equitable in nature, the claims substantively seek over $10,000 in damages from the United States. Defendants assert this Court therefore lacks jurisdiction, and the Court should transfer the case to the Court of Claims. Plaintiffs respond that their claims are primarily equitable in nature, and the United States waived sovereign immunity for claims seeking non-monetary relief under the APA. Plaintiffs contend the Claims Court does not have jurisdiction in this action because it has no power to award the declaratory or injunctive relief Plaintiffs seek.

The Tucker Act waives sovereign immunity for actions for monetary relief against the United States for claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §§ 1491(a)(1), 1346(a)(2). The Tucker Act provides three waivers of sovereign immunity: the Big Tucker Act, 28 U.S.C. § 1491; the Little Tucker Act, 28 U.S.C. § 1346(a)(2); and the Indian Tucker Act, 28 U.S.C. § 1505. *D.C. v. United States*, 67 Fed. Cl. 292, 305 n.5 (Fed. Cl. 2005). The Little Tucker Act waives sovereign immunity for actions for monetary relief against the United States brought in district court, but only if the claim does not exceed $10,000 in amount. 28 U.S.C. § 1346(a)(2). The Big Tucker Act does not contain an amount in controversy restriction but requires actions over $10,000 to be brought only in the Court of Claims. 28 U.S.C. § 1491. The Court of Claims and district courts thus share concurrent jurisdiction over monetary damages claims against

the United States up to $10,000, but where a claimant seeks more than $10,000, the claimant must sue in the Claims Court.

To fall within the Tucker Act's waiver, the plaintiff's claim must be "for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (internal citation and quotations omitted). The Tucker Act does not waive sovereign immunity in suits for equitable relief against the United States because the Court of Claims does not have the power to issue general equitable relief, and it may take certain remedial actions only "as an incident of and collateral to any . . . judgment." 28 U.S.C. § 1491(a)(2); *Richardson v. Morris*, 409 U.S. 464, 465-66 (1973) (stating the Court of Claims "has no power to grant equitable relief").

The APA also contains a specific waiver of the United States' sovereign immunity. *Bowen v. Massachusetts*, 487 U.S. 879, 891-92 (1988). The APA's waiver of sovereign immunity is limited, however. *Christopher Village, L.P.*, 360 F.3d at 1327. For a district court to exercise jurisdiction over a claim under the APA, the plaintiff's claim must be for "relief other than money damages" and there must be "no other adequate remedy in a court." 5 U.S.C. §§ 702, 704; *see also Doe v. United States*, 372 F.3d 1308, 1312 (Fed. Cir. 2004). A plaintiff's ability to sue the Government for money damages in the Claims Court may be an adequate remedy precluding an APA waiver of sovereign immunity in a district court. *Christopher Village, L.P.*, 360 F.3d at 1327.

Generally, a plaintiff "is absolute master of what jurisdiction he will appeal to," and "[j]urisdiction generally depends upon the case made and relief demanded by the plaintiff." *United States v. Mottaz*, 476 U.S. 834, 850 (1986) (quotation omitted). However, in determining the Court's jurisdiction under the Tucker Act and the APA, the Court must examine "the true nature of the action instead of merely relying on the plaintiff's characterization of the case."[3] *Doe*, 372 F.3d at 1315 (quotation omitted). Because of the limitations in the sovereign immunity waivers in both the Tucker Act and the APA, litigants can engage in forum shopping by the manner in which they plead their claims. The courts therefore look to the action's true nature to prevent litigants from circumventing the Claims Court's jurisdiction and thereby undermine the Tucker Act's purpose in ensuring "a central body adjudicates most claims against the United States Treasury." *Kidwell v. Dep't of Army, Bd. for Correction of Military Records*, 56 F.3d 279, 284 (D.C. Cir. 1995); *Consol. Edison Co. of N.Y., Inc. v. U.S., Dep't of Energy*, 247 F.3d 1378, 1385 (Fed. Cir. 2001) ("*Con Ed.*"). Conversely, the Court of Claims does not possess exclusive jurisdiction over a suit simply because the requested non-monetary relief may form the basis for a later money judgment against the Government. *See Bowen*, 487 U.S. at 904-05, 910; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978); *Doe*, 372 F.3d at 1313-14.

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[3] The Complaint's citation to § 1346(a) as a basis for jurisdiction is therefore immaterial. *Doe v. U.S.*, 372 F.3d 1308, 1315 (Fed. Cir. 2004) ("The fact that a party invokes the Little Tucker Act as a basis for district court jurisdiction does not mean that the court's jurisdiction is in fact based on that statute.").

The parties dispute three issues affecting the Court's jurisdiction. First, the parties dispute whether the Plaintiff's claims are based on a money-mandating statute. Second, they contest whether the requested equitable relief is substantively a request for money damages. Third, they dispute whether Plaintiffs could obtain adequate relief in the Court of Claims.

1. Money-Mandating Source

With respect to the money-mandating inquiry, the Tucker Act is "only a jurisdictional statute; it does not create any substantive cause of action enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Accordingly, to fall within the Tucker Act's waiver of sovereign immunity, the plaintiff must sue for money the Government improperly exacted or retained, or the plaintiff "must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). Where the plaintiff has paid money to the Government and seeks return of all or part of that sum, "the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp.*, 372 F.2d at 1007. Where the plaintiff has not made a payment to the Government, as in the present case, the plaintiff must allege "that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Id.* "In the parlance of Tucker Act cases, that source must be 'money-mandating." *Fisher*, 402 F.3d at 1172. The absence of

a money-mandating source is "fatal" to the Claims Court's jurisdiction under the Tucker Act. *Id.* at 1173. Whether a regulation, statute, or constitutional provision is money-mandating is a question of law. *Id.*

A statute is "money-mandating for jurisdictional purposes if it 'can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s].'" *Id.* (quoting Mitchell, 463 U.S. at 216-17). Examples of money-mandating provisions include the Military Pay Act (37 U.S.C. § 204), the General Schedule federal pay statute (5 U.S.C. § 5332); the Vaccine Act (42 U.S.C. §§ 300aa-1 to -34); military disability retirement statutes (10 U.S.C. § 1201 et seq.); the Civil Liberties Act of 1988 which provided restitution to individuals of Japanese ancestry who were interned during World War II (50 U.S.C. App. §§ 1989-1989d); the Transfer Act (24 U.S.C. § 225g) which required the United States to pay the District of Columbia for treating certain patients at District hospitals; and former 37 U.S.C. § 242 (*repealed*, *see* 76 Stat. 498 (1962)), which provided compensation to prisoners of war. *See, e.g., Bowen*, 487 U.S. at 905 n.42; *Fisher*, 402 F.3d at 1174-75; *Smith v. Sec'y of Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004); *Kanemoto v. Reno*, 41 F.3d 641, 642-43 (Fed. Cir. 1994); *Terran ex rel. Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302, 1309-10 (Fed. Cir. 1999); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983); *D.C. v. United States*, 67 Fed. Cl. at 305.

Generally, constitutional provisions other than the Fifth Amendment takings clause are not money-mandating. *See, e.g., Connolly*, 716 F.2d at 887 (noting that First Amendment and Fifth Amendment

due process clause, standing alone, do not mandate the payment of money); *Miller v. United States*, 67 Fed. Cl. 195, 198-99 (Fed. Cl. 2005) (same for Fifth and Fourteenth Amendment due process clauses and Eighth Amendment); *Achenbach v. United States*, 56 Fed. Cl. 776, 777 n. 1 (Fed. Cl. 2003) (same for the right to travel under the First Amendment, the due process clauses of the Fifth and Fourteenth Amendments, and the equal protection clause of the Fourteenth Amendment).

Plaintiffs assert they base their challenges to FEPCA on constitutional provisions, such as the Fifth Amendment's substantive due process and equal protection clauses. Plaintiffs argue those provisions of the Constitution are not money-mandating, and therefore no jurisdiction lies in the Court of Claims. Defendants argue Plaintiffs' claims actually are based on FEPCA, which they contend is a money-mandating statute. Defendants also note Plaintiffs assert claims under the Back Pay Act, a classic Tucker Act claim.

Although the Back Pay Act is a money-mandating provision, it is "derivative in application; it is not itself a jurisdictional statute." *Carroll v. United States*, 67 Fed. Cl. 82, 85 (Fed. Cl. 2005) (quotation omitted). The Back Pay Act is money-mandating only when a plaintiff identifies some other applicable law, rule, or regulation the Government violated, leading to a reduction in pay. *Id.* (citing *Worthington v. United States*, 168 F.3d 24, 26 (Fed. Cir. 1999)). "In sum, the [Back Pay Act], by itself, cannot be used as an exclusive basis for Tucker Act jurisdiction. There must be another legal provision, or agency decision, indicating that the pay differential was improper." *Id.*

The FEPCA is a money-mandating source. Federal pay statutes generally are money-mandating. *See Fisher*, 402 F.3d at 1174-75 (military physical disability retirement statute); *Bobo v. United States*, 136 F.3d 1465 (Fed. Cir. 1998) (Fair Labor Standards Act); *Carpenter v. United States*, 28 Fed. Cl. 195, 198 (Fed. Cl. 1993) ("The pay statutes, in conjunction with the [Back Pay Act], are the basis for entitlement to money when someone is restored to duty."); *Jackson v. United States*, 428 F.2d 844, 845-46 (Ct. Cl. 1970) (federal basic pay statute); *Swaaley v. United States*, 376 F.2d 857, 858 (Ct. Cl. 1967) (same). Additionally, statutes which have been considered money-mandating contain language indicating the Government "shall pay" money upon certain conditions. *See Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating."); *D.C. v. United States*, 67 Fed. Cl. at 305 ("When a statute states that the United States 'shall pay' compensation for a rendered service, such a statute is generally found to be money-mandating."). FEPCA states "[c]omparability payments shall be payable within each locality determined to have a pay disparity greater than 5 percent." 5 U.S.C. § 5304(a)(1). Accordingly, FEPCA is a money-mandating source.

The question, then, is whether Plaintiffs claims are based on FEPCA or the non-money-mandating constitutional provisions alleged in Plaintiffs' Complaint. The Federal Circuit has held that certain constitutional provisions, such as the ones Plaintiffs cite, cannot, "*standing alone*," support Tucker Act jurisdiction. *Hamlet v. United States*, 873 F.2d 1414, 1416-17 (Fed. Cir. 1989) (quotation omitted). However, if the alleged constitutional violation forms

part of the plaintiff's claim that he has been illegally deprived of money, the claim actually is based on a money-mandating statute. *See id.* at 1416-17 (finding Claims Court erred by not considering whether a personnel manual's provisions for back pay were sufficient to support the plaintiff's monetary claim even though plaintiff based her claim on a constitutional provision which itself was not money-mandating); *Connolly*, 716 F.2d at 887 (citing *Jackson*, 428 F.2d 844 and *Swaaley*, 376 F.2d 857 as examples of constitutional claims seeking back pay under federal pay statutes falling within the Claims Court jurisdiction); *see also Kanemoto*, 41 F.3d at 646-47 (ruling the Claims Court has jurisdiction where plaintiff alleged the Justice Department's decision not to award her restitution under the Civil Liberties Act of 1988 violated equal protection and due process clauses).

For example, in *Jackson*, the plaintiff was a federal employee who alleged he was fired in violation of his First Amendment right to petition the Government. *Jackson*, 428 F.2d at 845-46. The Court of Claims concluded it had jurisdiction under the Tucker Act even though the plaintiff's back pay claim was based on a non-money-mandating provision of the Constitution. *Id.* at 846. In *Swaaley*, an honorably discharged veteran sought to recover salary he would have earned but for his alleged unlawful discharge based on his First Amendment right to petition the Government. *Swaaley*, 376 F.2d at 858. The Court of Claims exercised jurisdiction in that case even though it was based on a non-money-mandating provision of the Constitution. *Id.* As the Federal Circuit later explained, *Jackson* and *Swaaley* properly were brought in the Court of Claims because the court's jurisdiction arose "from the pay legislation pertaining to those employees and the latters' invoca-

tion of the first amendment formed part of their claims that they had been illegally deprived of their pay." *Connolly*, 716 F.2d at 887; *Walker v. United States*, 11 Cl. Ct. 77, 79-80 (Cl. Ct. 1986) ("[T]he . . . Federal Circuit . . . has expressly determined that jurisdiction in *Jackson* and *Swaaley* was based not on constitutional grounds, but rather on a statutory entitlement to pay provided in the basic pay statute.").

Plaintiffs' claims are fundamentally different from those in *Jackson*, *Swaaley*, and *Kanemoto*, however. The plaintiffs in those cases did not challenge the constitutionality of the pay or restitution statutes themselves, but rather challenged allegedly unconstitutional agency decisions rendering the plaintiff ineligible for pay he otherwise was entitled to and would have received under those statutes but for the allegedly unconstitutional conduct. Unlike those cases, Plaintiffs here allege FEPCA itself is unconstitutional because it excludes them from its coverage. The very crux of Plaintiffs' constitutional claims is that FEPCA as written does not mandate that the Government pay them locality pay, indeed it does the opposite. Accordingly, if Plaintiffs' claims were based on FEPCA, this source of substantive law could not fairly be interpreted as mandating compensation by the Federal Government for the damages these particular Plaintiffs have sustained because FEPCA specifically precludes payment to Plaintiffs. *See Mitchell*, 463 U.S. at 216-17. Because FEPCA does not impose a duty to pay Plaintiffs locality pay, the Government's failure to do so does not breach FEPCA and FEPCA therefore does not mandate payment in compensation for the Government's allegedly unconstitutional conduct. *Fisher*, 402 F.3d at 1173.

Clearly Plaintiffs' claims are not based on FEPCA as a money-mandating source, but rather on the non-money-mandating constitutional provisions which Plaintiffs assert render FEPCA unconstitutional. Thus, if the Court transferred this action to the Court of Claims, it would there be dismissed for lack of jurisdiction. *See id.* (lack of money-mandating source is "fatal" to the Claims Court jurisdiction); *Connolly*, 716 F.2d at 887 (First Amendment and Fifth Amendment due process clause are not money-mandating); *Achenbach*, 56 Fed. Cl. at 777 n.1 (same for First Amendment, the due process clauses of the Fifth and Fourteenth Amendments, and the equal protection clause of the Fourteenth Amendment).

This result is even more evident with respect to the proposed class of Plaintiffs living and working for the federal government in the contiguous United States (the "CONUS" Plaintiffs). By definition, these Plaintiffs have received locality pay under FEPCA. Because these Plaintiffs have received locality pay, they are not suing to receive money owed to them based on FEPCA. Their claims are based on the non-money-mandating constitutional claim that FEPCA's exclusion of Hawaiian and Alaskan employees from locality pay impinges on the CONUS Plaintiffs' right to interstate travel. The Fifth Amendment equal protection clause is not a money-mandating provision. Accordingly, the Court finds these claims by Plaintiffs are not based on a money-mandating source.

2. Relief Other Than Money Damages Under the APA

Even if Plaintiffs' claims under the FEPCA were based on a money-mandating statute, this Court may have jurisdiction under the APA's waiver of sovereign

immunity. Section 702 of the APA applies only if Plaintiffs request relief "other than money damages." The Court must examine the substance of Plaintiffs' claims to determine whether the requested relief is, essentially, a request for money damages as opposed to equitable relief. Courts have phrased this inquiry as determining the true nature, "crux," or "prime objective" of the plaintiff's claims. *See Doe*, 372 F.3d at 1313-14 (holding true nature of plaintiff's complaint seeking injunction forcing government to pay for abortion where plaintiff could not afford it was in substance equitable, even though it would force government expenditure of funds); *Wilkins v. United States*, 279 F.3d 782, 786-87 (9th Cir. 2002) (holding "crux" of military chaplain's complaint was challenge to the Chaplain Corps' structure in hiring certain percentages of liturgical and non-liturgical chaplains, and injunctive relief to address changes to that structure was outside CFC's jurisdiction); *Veda, Inc. v. U.S. Dep't of the Air Force*, 111 F.3d 37, 39 (6th Cir. 1997) ("The test states that if the 'prime objective' of the complaining party is simply to obtain money from the federal government, the case belongs in federal claims court."); *Francis E. Heydt Co. v. United States*, 948 F.2d 672, 675-76 (10th Cir. 1991) (court should determine whether suit's primary objective is to obtain monetary damages or equitable relief).

To determine whether the plaintiff"s complaint seeks monetary damages rather than equitable relief, the Court must consider whether the requested equitable relief has significant prospective effect, has considerable value apart from merely determining the Government"s monetary liability, or is spurious, and whether the actual relief resulting from the equitable claim would be monetary. *Kidwell*, 56 F.3d

at 284 (plaintiff's complaint must request non-monetary relief that has considerable value independent of any future potential for monetary relief); *Marshall Leasing, Inc. v. U.S.*, 893 F.2d 1096, 1099 (9th Cir. 1990); *Hahn v. U.S.*, 757 F.2d 581, 590 (3d Cir. 1985); *see also Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981) ("We will not construe plaintiffs" request as one for injunctive relief when the relief sought is substantively equivalent to a request for a monetary award.").

Plaintiffs" Complaint seeks (1) declarations that FEPCA's exclusion of Hawaiian and Alaskan employees from receiving locality pay is unconstitutional; (2) injunctions prohibiting the Government from continuing the disparity; (3) damages for constitutional violations, and (4) back pay under the Back Pay Act. Plaintiffs assert they are seeking primarily declaratory and injunctive relief forcing the restructuring of the pay system. Defendants respond that a declaratory judgment and injunction would, in effect, grant Plaintiffs a judgment to enforce in the Court of Claims for money damages. Defendants argue that although Plaintiffs have styled their Complaint as seeking equitable relief, Plaintiffs really are asserting claims for money damages. The Court disagrees.

Plaintiffs' Complaint substantively seeks equitable relief in the form of declaratory and injunctive relief. Because the CONUS Plaintiffs have received locality pay, the only relief they could obtain by this action would be a declaratory judgment that FEPCA's pay disparity violates their right to interstate travel, and an injunction requiring the United States to cease the pay disparity. Although Defendants suggest scenarios in which some CONUS Plaintiffs may be able to state a claim for monetary relief, the tortured

factual scenarios they present demonstrate that monetary relief for the CONUS Plaintiffs under FEPCA is unlikely and, at best, a secondary result.

The Hawaiian and Alaskan Plaintiffs present a closer question, but these Plaintiffs also seek substantial equitable relief. A declaratory judgment in Plaintiffs' favor coupled with injunctive relief would require the Government to alter its conduct in the future by either doing away with pay comparability for all employees, or including Hawaiian and Alaska employees in the pay comparability scheme. Hence, if Plaintiffs prevail, they will achieve a result with prospective value independent of any request for retroactive monetary relief by altering the Government's treatment of Hawaiian and Alaskan employees under FEPCA in the future.

Further, judgment in Plaintiffs' favor would not necessarily result in a sum certain award of monetary relief to Plaintiffs based on past conduct. FEPCA provides for locality pay only within localities with a pay disparity greater than five percent. 5 U.S.C. § 5304(a)(1). FEPCA directs the President of the United States to designate an agent to prepare annual reports comparing rates under the General Schedule with pay rates for non-Federal workers for the same work within a pay locality based on surveys prepared by the Bureau of Labor Statistics. 5 U.S.C. § 5304(d)(1). Based on the surveys, the designated agent must identify those localities in which a pay disparity exists, and make recommendations for comparability payments. *Id.* § 5304(d)(1)(B)-(C). The procedures include participation by a Federal Salary Council, which may submit its collective or individual members" views and recommendations. *Id.* § 5304(d)(1)(D), (e). The Executive Branch then must

provide for or adjust comparability pay in conformity with the findings and transmit a report to Congress identifying each pay locality, specifying which pay localities have a pay disparity greater than five percent, and indicating the comparability pay. *Id.* § 5304(d)(2)-(3).

Because FEPCA has excluded Hawaiian and Alaskan employees, whether employees in these locations are even entitled to locality pay or the amount of any such locality pay is unknown. Thus, judgment in Plaintiffs' favor would not entitle them to a sum certain award. If the required survey found no pay disparity greater than five percent existed in Hawaii or Alaska, Plaintiffs would not be entitled to any money damages because they would not have been deprived of locality pay under FEPCA. Even if a disparity greater than five percent existed, determining a damage award for the amount of comparability pay these employees may be entitled to under FEPCA would not be based on known parameters in the statute. Ensuring conformity with FEPCA's procedures to determine comparability pay may require prospective injunctive relief. Because Plaintiffs' Complaint requests equitable relief with significant prospective effect of considerable value beyond monetary relief, their claims seek relief other than money damages under the APA's waiver of sovereign immunity.

3. Plaintiffs' Claims for Monetary Damages

Unlike their dominant claims for equitable relief, Plaintiffs also seek relief in the form of monetary damages for constitutional violations. As to these claims, this Court lacks jurisdiction. *See Wilkins*, 279 F.3d at 785 (affirming district court's dismissal of monetary damages claims over $ 10,000, even though

concluding district court had jurisdiction over claims seeking equitable relief). Plaintiffs have not opted to limit their request for damages to under $ 10,000, and thus the Little Tucker Act does not constitute a valid waiver of sovereign immunity in this Court. Further, the APA applies only to claims for relief other than money damages. A request for compensatory damages for constitutional violations does not come within the APA"s waiver under § 702. Plaintiffs have not identified any other applicable waiver of sovereign immunity for this requested relief. The Court therefore will dismiss for lack of jurisdiction Plaintiffs" claims for damages for alleged constitutional violations.

Additionally, the Court will dismiss Plaintiffs' claims under the Back Pay Act because the requested relief in this case would be for "money damages" as that term is used in § 702. Back pay's status as compensatory damages or specific relief is not always clear. In *Bowen*, the Supreme Court referred to reinstatement of an employee with back pay as a form of specific relief, not money damages. *Bowen*, 487 U.S. at 893. The Supreme Court noted that sometimes specific relief comes in the form of money, but that does not convert it to "money damages," i.e., compensatory damages. *Id.* at 893-94. "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled. Thus, while in many instances an award of money is an award of damages, [o]ccasionally a money award is also a specie remedy." *Id.* at 895 (internal citation, quotations, and emphasis omitted).

In the present case, however, a plain reading of the statute demonstrates that Plaintiffs are not entitled to locality pay under FEPCA. Accordingly, if Plaintiffs prevail, any monetary relief to which they may be entitled would be in the form of compensatory damages for constitutional violations. Because Plaintiffs" Back Pay Act claim seeks money damages, and Plaintiffs have not agreed to cap those damages at $10,000, this Court lacks jurisdiction to award monetary relief under the Back Pay Act.

4. The Court of Claims as an Alternative Adequate Remedy Under the APA

Defendants argue that even if Plaintiffs' claims call for non-monetary damages, the APA's sovereign immunity waiver still does not apply because an adequate remedy is available in the Court of Claims. Defendants argue Plaintiffs would not need a declaratory judgment or injunction because the Claims Court's judgment that the Government owes Plaintiffs for back pay would "declare" the FEPCA's exclusion of Hawaiian and Alaskan employees as unconstitutional, and res judicata would serve the same function as an injunction. Plaintiffs argue the Claims Court cannot provide an adequate remedy because it has no power to issue declaratory relief or award prospective equitable relief.

The APA's waiver of sovereign immunity has two requirements. Section 702 requires the litigant request "relief other than money damages," and § 704 requires there be no "adequate remedy" available in another court. 5 U.S.C. §§ 702, 704. "In effect, § 704 withdraws the limited waiver of immunity under § 702 if an adequate judicial remedy is already available elsewhere." *Con. Ed.*, 247 F.3d at 1383.

The Federal Circuit has considered the availability of money damages against the Government in the Court of Claims as an "adequate remedy" precluding district court jurisdiction under the APA. *See id.*; *Kanemoto*, 41 F.3d at 645-46. In *Con Ed*, the plaintiffs were nuclear utilities which sued the United States alleging the Energy Policy Act of 1992 ("EPACT") was unconstitutional. *Con Ed*, 247 F.3d at 1381. EPACT required the nuclear utilities to pay assessments for decontamination and decommissioning costs for uranium enrichment facilities. *Id.* at 1381-82. The utilities challenged EPACT's constitutionality on takings and due process grounds, and sought only declaratory and prospective injunctive relief. *Id.* The Government challenged the district court's jurisdiction, and moved for a transfer to the Claims Court. *Id.* On appeal, the Federal Circuit ruled the district court below had erred by determining it had jurisdiction under the APA. *Id.* at 1382, 1384-85. The Court concluded the APA's sovereign immunity waiver did not apply because the utilities could get adequate relief in the Court of Claims. *Id.* at 1384-85. The Federal Circuit concluded a money judgment on the past payments would declare the statute's constitutionality, and res judicata principles would act as an injunction on future payments. *Id.* Of particular relevance was that the same utilities had already sued in the Court of Claims for damages, and having lost there, were engaged in forum shopping. *Id.* at 1385.

However, a "naked money judgment against the United States" will not always be an adequate substitute for relief available in a district court under the APA. *Bowen*, 487 U.S. at 905; *see also Kanemoto*, 41 F.3d at 645 ("[B]ecause the range of relief available in the Court of Federal Claims is limited, the waiver of

sovereign immunity provided under the Tucker Act will not always provide an adequate remedy in a suit against the United States."). Courts thus must evaluate whether the Claims Court's jurisdiction actually will provide the plaintiff with an adequate remedy under § 704, or if the particular facts of the case or the type of relief requested makes the Claims Court's limited ability to afford relief an inadequate forum to provide the plaintiff with a complete and meaningful remedy.

Plaintiffs do not have an adequate remedy in the Court of Claims because that court would not have jurisdiction over their claims. As discussed above, Plaintiffs" claims are not based on a money-mandating source. Lack of a money-mandating basis for the suit is "fatal" to the Claims Court's jurisdiction. *Fisher*, 402 F.3d at 1173. The Court of Claims therefore cannot provide Plaintiffs an adequate remedy because it can provide no remedy at all.

Because Plaintiffs' claims request relief other than money damages and the Court of Claims cannot provide an adequate alternative remedy, the APA's waiver of sovereign immunity applies. This Court therefore has jurisdiction over Plaintiffs' locality pay claims, and the Court will deny Defendants' motion to dismiss counts one and two.

II. VENUE

Defendants assert venue is improper in this Court because under 28 U.S.C. § 1402, which governs suits against the United States brought under § 1346(a), venue is proper only in the judicial district in which the plaintiff resides. Here, only five of the named Plaintiffs reside in Hawaii. Additionally, the entire putative class of federal employees living in the

contiguous United States would not meet § 1402's venue requirement. Plaintiffs argue § 1402 applies only if the suit is brought under § 1346(a), the Little Tucker Act. Plaintiffs argue that because they do not bring their claims under the Little Tucker Act, § 1402 does not apply. Rather, Plaintiffs argue that they bring their claims under 28 U.S.C. § 1331's general federal question jurisdiction, and § 1391(e) is the applicable venue statute rendering venue in Hawaii appropriate.

Pursuant to § 1402(a), a civil action "in district court against the United States under subsection (a) of section 1346 . . . may be prosecuted only . . . in the judicial district where the plaintiff resides." 28 U.S.C. § 1402(a)(1). Defendants' venue argument rests upon Defendants' position that this case is brought under the Little Tucker Act. The Little Tucker Act applies only to damages claims under $10,000. Defendants themselves note that fourteen of the fifteen named Plaintiffs and half of the putative class members would have claims over $10,000. Plaintiffs have not stipulated to cap their damages under $10,000. The Little Tucker Act does not apply, and thus neither does § 1402, as its application is restricted to claims brought under § 1346(a).

Absent a more specific venue provision, the governing venue statute for a civil action in which a defendant is an agency of the United States is 28 U.S.C. § 1391(e). *Immigrant Assistance Project of Los Angeles County Fed"n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 868 (9th Cir. 2002). Pursuant to 28 U.S.C. § 1391(e):

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under

> color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, Q a substantial part of the events or omissions giving rise to the c aim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e). With respect to the third prong, in a multi-plaintiff suit, only one plaintiff must reside in the district for venue to be proper as to all plaintiffs. *See Sidney Coal Co., Inc. v. Soc. Sec. Admin.*, 427 F.3d 336, 343-46 (6th Cir. 2005) (noting this interpretation is the "only view" federal courts have taken of the statute since enactment and listing cases); *Ry. Labor Executives' Ass'n v. I.C.C.*, 958 F.2d 252, 256 (9th Cir. 1991) (noting the Court need not analyze venue as to one plaintiff under § 1391(e) where venue was satisfied by other plaintiff). Because the legislative history shows the purpose of § 1391(e) was to ease the burden on plaintiffs attempting to bring suit against the federal government, requiring each plaintiff to reside in the district for venue purposes would undermine legislative intent. *Sidney Coal Co., Inc.*, 427 F.3d at 344-45.

Five of the named Plaintiffs reside in Hawaii. (First Am. Compl. TT 2, 6, 8, 12, 13.) Venue in the District of Hawaii therefore is appropriate for all Plaintiffs under § 1391(e)(3). Additionally, Hawaii is a convenient forum. *See Sec. Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1313 (9th Cir. 1985) (venue "is intended for the convenience of the litigants"). Several of the named Plaintiffs and a substantial

portion of one of the purported classes resides in Hawaii. The challenged activity's effects have been felt, among other places, in Hawaii. The Plaintiffs have chosen Hawaii as their forum. Plaintiffs all raise an identical constitutional challenge to a federal statute. Splitting their claims would waste resources and raise the potential for inconsistent judgments. Defendants have not argued Hawaii is an inconvenient venue for the proceedings, and even suggested at the hearing in this matter that if the Court of Claims took jurisdiction of the case, it may have conducted its proceedings in Hawaii. Venue therefore is appropriate in the District of Hawaii, and the Court will deny Defendants' motion to dismiss for lack of venue.

III. COLA CLAIMS

Defendants assert that even if this Court has jurisdiction over Plaintiffs' locality pay claims, Plaintiffs' claims that COLA benefits should be calculated as part of their retirement pay must be pursued under the exclusive review provisions in the CSRA and FERSA. Plaintiffs respond that these two Acts permissively let employees pursue claims in front of the MSPB, but do not require it.

"The CSRA specifies the benefits to which federal employees and their survivors are entitled, and provides a reticulated remedial regime for beneficiaries to secure review—including judicial review—of benefits determinations.'" *Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005). "This enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an 'unnecessary layer of judicial review' in lower federal courts, and '[e]ncourages more consistent judicial decisions . . . .'"

United States v. Fausto, 484 U.S. 439, 449 (1988) (quoting S. Rep. No. 95-969, at 52, U.S. Code Cong. & Admin. News 1978, p. 2774)). Based on these considerations, many courts hold the CSRA's remedial provisions are "exclusive, and may not be supplemented by the recognition of additional rights to judicial review having their sources outside the CSRA.'" *Fornaro*, 416 F.3d at 66; *see also Moore v. Glickman*, 113 F.3d 988, 994 n.7 (9th Cir. 1997) (noting that employees covered by the CSRA cannot seek APA review of the MSPB's adjudication of personnel disputes because statutes place review in the Federal Circuit); *Steele v. United States*, 19 F.3d 531, 532-33 (10th Cir. 1994) (CSRA preempts federal and state court actions complaining of activities the CSRA prohibits); *Veit v. Heckler*, 746 F.2d 508, 509 (9th Cir. 1984) (CSRA's comprehensive remedial scheme "indicates a congressional intent to preclude judicial review except as provided for in the statute itself"). Because the CSRA sets forth a comprehensive remedial scheme providing for a uniform resolution of federal employment issues, courts have declined to allow litigants to circumvent these procedures by attempting to rely on other statutes, such as the APA. *See Rivera v. United States*, 928 F.2d 948, 95-52 (9th Cir. 1991) (holding plaintiff's employment retaliation claim must be remedied through the CSRA, not the Federal Tort Claims Act); *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982) ("We decline to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA."). Thus, to the extent a question falls within the MSPB's jurisdiction under the CSRA or FERSA, it is the exclusive remedy for federal employees.

The MSPB has jurisdiction over "any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. § 7701 (a). With respect to retirement, both the CSRA and FERSA set forth the factors to be considered in computing retirement, and vest administration of the program in OPM. 5 U.S.C. §§ 8339, 8347(a), 8415, 8461(b). An individual or the United States may appeal "an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter . . . to the Merit Systems Protection Board under procedures prescribed by the Board." 5 U.S.C. § 8347(d)(1); *see also id.* at § 846 1 (e)(1) ("an administrative action or order affecting the rights or interests of an individual or of the United States under the provisions of this chapter administered by the Office may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board"). MSPB decisions are appealable to the Federal Circuit. 5 U.S.C. § 7703 (b)(1).

Retirement computation is a matter within OPM's administration, and exclusively reserved for appeal to the MSPB, with judicial review available in the Federal Circuit. This Court does not have jurisdiction over Plaintiffs' claims regarding the Government's failure to include COLA payments in Plaintiffs' retirement calculations because such a question would fall within the computation of retirement, a matter within the CSRA and FERSA's exclusive review procedures. Case law uniformly describing the CSRA and FERSA's remedial schemes as the exclusive procedures for federal employees challenging issues within the CSRA and FERSA's scope contradicts Plaintiffs' argument that the statutes' use of the word "may" makes appeal to the MSPB optional rather than mandatory. The Court therefore will dismiss

counts three and four of Plaintiff's Complaint for lack of jurisdiction.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss or, in the Alternative, to Transfer (Doc. #8) is GRANTED as to Counts three and four of Plaintiffs' Complaint which are hereby dismissed without prejudice for lack of jurisdiction.

IT IS FURTHER ORDERED that Defendants" Motion to Dismiss or, in the Alternative, to Transfer (Doc. #8) is DENIED with respect to Counts one and two of Plaintiffs" Complaint.

IT IS FURTHER ORDERED that unless the parties take an appeal from this Court's Order to the United States Court of Appeals for the Federal Circuit, Defendants shall file an Answer to Plaintiffs" Complaint on or before March 22, 2006.

DATED: February 21, 2006

/s/ PHILIP M. PRO
PHILIP M. PRO
Chief United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 05-00398 PMP-LEK

JOYCE MATSUO; SHARON WARREN; RONALD FRANKLIN; FRANK HARDT; RUSSELL HOLLAND; ROY MATSUO; MICHAEL MCCRARY; FRED NOLKE; CHARLES ROBERTS; RONALD SCHERLER; ROMAN BUYSON; PETER NEWMAN; THOMAS WARREN; JOHN J. KATO; and MICHAEL C. SHEARER, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

THE UNITED STATES, and LINDA M. SPRINGER, Director, Office of Personnel Management,

Defendants.

ORDER

This is a class action challenging the constitutionality of the Federal Employees Pay Comparability Act of 1990 ("FEPCA"), which provides locality-based comparability pay to federal employees to reduce pay disparities between public and private sector employees performing similar work. By its terms, FEPCA applies only to federal employees within the contiguous United States and specifically excludes federal employees in Hawaii and Alaska from receiving locality pay. Plaintiffs are former and current federal employees who work or have worked in Hawaii or Alaska and therefore did not receive locality pay, or federal employees who work in the

contiguous United States and cannot move to Hawaii or Alaska without losing locality pay.

In the First Amended Complaint, Plaintiffs allege the locality pay exclusion for Hawaii and Alaska federal employees is based on state residence and therefore is an unconstitutional restriction on interstate travel in violation of the Equal Protection Clause of the Fifth Amendment to the United States Constitution (count 1). (First Am. Compl. [Doc. #7] at ¶¶ 32-35.) Plaintiffs also allege federal employees have a property interest in their salary, and FEPCA's exclusion of Hawaii and Alaska federal employees from receiving locality pay violates substantive due process under the Fifth Amendment (count 2). (*Id.* ¶¶ 36-41.) Plaintiffs also asserted two claims regarding cost of living adjustments, but the Court previously dismissed those two claims (counts 3 and 4). *Matsuo v. United States*, 416 F. Supp. 2d 982, 997-99 (D. Haw. 2006).

Upon the parties' stipulation, the Court certified two classes. (Joint Stip. & Order Regarding Class Certification [Doc. #61].) The first class includes all federal employees in the contiguous United States ("CONUS") who are entitled to locality pay under FEPCA who cannot reside in Alaska or Hawaii and work for the United States without losing locality pay. (*Id.*) The second class consists of current or former federal employees in Hawaii and Alaska who are or were not eligible for locality pay. (*Id.*) The parties now cross move for summary judgment.

I. BACKGROUND

By Executive Order in 1948, federal employees in Hawaii and Alaska became eligible to receive compensation in addition to their base pay due to

living costs that were substantially higher than living costs in the District of Columbia. *See* Exec. Order No. 10,000, 13 Fed. Reg. 5453, 5455 (Sept. 18, 1948). Congress subsequently codified this cost of living allowance ("COLA") for federal employees in Hawaii, Alaska, and other non-foreign areas outside the continental United States. *See* Pub. L. 89-554, 80 Stat. 512, 513 (1966), 5 U.S.C. § 5941(a). As of September 2007, Hawaii and Alaska federal employees received COLAs ranging between 17% and 25% of their base pay, with most areas at or near the statutory cap of 25% of base pay. *See* 5 C.F.R., Part 591, Subpart B, App. A; 5 U.S.C. § 5941(a). COLA payments are not considered part of base pay, and therefore these employees may not make retirement contributions based on COLA payments and the COLA payments are not included in calculating the employees' retirement annuities. 5 C.F.R. § 591.239(b). The COLA payments are not subject to federal income tax. 26 U.S.C. § 912(2).

In 1990, Congress enacted FEPCA, under which federal employees would receive comparability payments, or "locality pay," designed to reduce and eventually eliminate pay disparities between federal and non-federal employees performing similar work. 5 U.S.C. § 5301, § 5304. FEPCA directs the President of the United States to designate an agent to prepare annual reports comparing pay rates for federal employees under the General Schedule with pay rates for non-federal workers for the same work within a pay locality based on surveys prepared by the Bureau of Labor Statistics. 5 U.S.C. § 5304(d)(1). Based on the surveys, the designated agent must identify those localities in which a pay disparity greater than five percent exists, and make recommendations for comparability payments. *Id.*

§ 5304(a)(1), § 5304(d)(1)(B)-(C). The procedures include participation by the Federal Salary Council, which may submit its collective or individual members' views and recommendations. *Id.* § 5304(d)(1)(D), § 5304(e). The Executive Branch then must provide for or adjust comparability pay in conformity with the findings and transmit a report to Congress identifying each pay locality, specifying which pay localities have a pay disparity greater than five percent, and indicating the locality pay for the applicable calendar year. *Id.* § 5304(d)(2)-(3).

Currently, thirty-two locality payment areas have been identified and locality pay percentages set based primarily on the pay disparity between federal and non-federal employees performing similar work in a given locality. 5 U.S.C. § 5301(3), § 5302(6), § 5304(a), (d), & (f); 5 C.F.R. §§ 531.603 & 531.604. For 2007, locality payments ranged from a low of 12.64% of base pay for the locality designated as the "Rest of U.S.," to a high of 30.33% for "San Jose-San Francisco-Oakland, California." Exec. Order No. 13,420, 71 Fed. Reg. 77,571, 77,580 (Dec. 26, 2006). Locality pay constitutes part of an employee's base pay and is included in calculating retirement contributions and annuities. 5 U.S.C. § 5304(c)(2). Retirement benefits under the Federal Employees Retirement System are calculated in large part based on the average of an employee's highest three consecutive years of base pay. 5 U.S.C. § 8331(4), § 8339. The provision exempting the COLA from federal income tax does not apply to locality pay and locality pay therefore is subject to federal income tax. 26 U.S.C. § 912.

All federal employees employed within the continental United States are entitled to receive locality excludes federal employees in Hawaii and Alaska

from receiving locality pay. *See* 5 U.S.C. § 5304(f)(1)(A); 5 U.S.C. § 5701(6). The legislative history is silent as to why Congress chose to exclude Hawaii and Alaska employees from receiving locality pay.

As a result of locality pay, but not COLA, being included in calculating retirement contributions and annuities, FEPCA's exclusion of Hawaii and Alaska employees means these employees are not able to contribute as much to their retirement as similarly situated CONUS employees. Additionally, Hawaii and Alaska employees' base pay for determining their highest three years for calculating their retirement annuities is less than similarly situated CONUS employees who receive locality pay. However, Hawaii and Alaska employees' COLA is exempt from federal income tax while CONUS employees' locality pay is subject to federal income tax.

Since FEPCA's enactment, FEPCA's exclusion of Hawaii and Alaska federal employees has influenced federal employees' decisions about whether to move from these states to CONUS to receive locality pay. As reflected in Plaintiffs' affidavits, federal employees in Hawaii or Alaska consider moving or in fact have moved to federal positions in CONUS to receive locality pay, particularly as they near retirement. (Pls.' Mot. for Summ. J. [Doc. #82], Decls. of Charles H. Roberts, Frank A. Hardt, Fred Nolke, John J. Kato, Joyce K. Matsuo, Michael R. McCrary , Roman J. Buyson, Roy T. Matsuo ("Roy Matsuo Decl."), Russell F. Holland, Thomas C. Warren, Michael C. Shearer, Peter M. Newman, and Sharon E. Warren; *see also* Pls.' Opp'n to Defs.' Mot. for Summ. J., Decl. of Ronald W. Scherler.)

For example, Plaintiff Roy Matsuo ("Matsuo") began working as a GS-5 Office Automation Assistant in Hawaii in 2000. (Roy Matsuo Decl. at 1.) By 2005, he was a GS-12 Contract Specialist. (*Id.* at 2.) Matsuo decided that to improve his retirement benefits, he would transfer to a position in CONUS to increase his highest three consecutive years of base pay by taking a position that included locality pay in his base pay. (*Id.* at 2.) Matsuo therefore transferred to San Diego, California, where he received locality pay of approximately 16%. (*Id.*) To make this transfer, Matsuo had to leave behind his elderly parents who required a great deal of care and his wife who cared for Matsuo's parents in Hawaii during his absence. (*Id.*) The separation strained Matsuo's relationships with his wife and his parents, and after seventeen months, Matsuo returned to Hawaii. (*Id.* at 2-3.) Matsuo avers that he would like to retire within the next five years, but because he lives in Hawaii and does not receive locality pay, his retirement benefits will be significantly less than those of a comparably situated GS-12 Contract Specialist in CONUS who receives locality pay. (*Id.* at 3-4; *see also* other employee affidavits for similar averments regarding plans to move to CONUS to receive locality pay, particularly as employees near retirement.)

FEPCA's impact on federal employees and their decision making has not gone unnoticed by Defendant Office of Personnel Management ("OPM"). In July 2001, OPM prepared a draft options paper on Pay and Retirement Benefits for White-Collar Civilian Federal Employees Outside the Continental U.S. ("Options Paper"). (Pls.' Opp'n to Defs.' Mot. for Summ. J., Ex. N.) In the Options Paper, OPM noted, "Over the past 7 years, the total pay and retirement benefits of white-collar civilian Federal employees

outside the continental U.S. (OCONUS) have eroded gradually in relation to the pay and retirement benefits of similarly situated employees in the continental U.S. (CONUS)." (*Id.*) The Options Paper notes this shift began in 1994, when FEPCA's provisions first were implemented. (*Id.*) The Options Paper acknowledges that because locality pay is included in retirement calculations, "the introduction of locality pay for CONUS employees puts OCONUS employees at a life-long disadvantage with regard to their retirement income." (*Id.*)

The Options Paper notes that although OCONUS employees receive COLAs, "many OCONUS employees perceive a serious and growing inequity between the pay and retirement benefits of CONUS and OCONUS employees." (*Id.*) The Options Paper also indicated that "many OCONUS managers believe actual or perceived disparities between the pay and retirement benefits of CONUS and OCONUS employees create staffing problems in OCONUS areas, especially for employees near retirement." (*Id.*) According to the Option Paper, the State Department noted that "many senior level employees plan ahead and arrange to be stationed in the DC area for their final tour (in order to receive the benefit of DC locality pay in the calculation of their retirement annuity)." (*Id.*) Additionally, "[o]ther Federal agencies with large numbers of OCONUS employees also expect to encounter OCONUS staffing problems in the future if nothing is done to address actual or perceived disparities between the pay and retirement benefits of CONUS and OCONUS employees." (*Id.*)

The Options Paper suggested three options to address these problems, and recommended adopting an option which extended locality pay to Hawaii and

Alaska employees while eliminating the COLA, but freezing current COLA rates to protect employees' take home pay. (*Id.*) The Options Paper suggested funding locality pay to OCONUS employees by reducing CONUS locality pay. (*Id.*) The Options Paper noted that the most serious objection to this option likely would come from CONUS employees, however,

> CONUS employees have received slightly higher locality payments since 1994 by virtue of the fact that the total amount of money available for such payments has been calculated as a percentage of the total payroll for all GS employees, including OCONUS employees. In effect OCONUS employees have "subsidized" locality payments for CONUS employees for the last 7 years. The proposal outlined above, therefore, is designed to create a level playing field for CONUS and OCONUS employees without substantially increasing overall payroll and retirement costs.

(*Id.* at 7.)

OPM also acknowledged these problems in a February 2003 Senate briefing. (Pls.' Mot. for Summ. J., Ex. G.) In the briefing, OPM noted that "[r]etirement benefits of white-collar civilian Federal employees stationed outside the continental U.S. are lower compared with their counterparts' benefits in the continental United States (CONUS)." (*Id.*) OPM identified FEPCA's exclusion of Hawaii and Alaska from locality pay as the reason for this disparity, and indicated this "cause[s] actual and potential staffing problems in foreign and nonforeign areas, especially for employees near retirement." (*Id.*) OPM further indicated that "[b]ase pay of COLA area employees is not keeping pace with [District of Columbia] locality pay." (*Id.*)

In October 2007, the Federal Salary Council issued a memorandum regarding the Level of Comparability Payments for January 2009 and Other Matters Pertaining to the Locality Pay Program. (Pls.' Opp'n to Defs.' Mot. for Summ. J., Ex. M.) The Federal Salary Council indicated the Bureau of Labor Statistics conducted salary surveys in Anchorage, Alaska and Honolulu, Hawaii, and determined "the pay gap between GS and non-Federal pay in Anchorage is 54.96 percent and the pay gap in Honolulu is 41.72 percent. Both are well above the 29.64 percent pay gap in the Rest of U.S. locality pay area." (*Id.* at 9.) The Federal Salary Council also noted that the Administration recently proposed legislation to gradually replace the COLA with locality pay. (*Id.* at 8-9.)

Plaintiffs brought a class action in this Court asserting FEPCA's exclusion of Hawaii and Alaska federal employees violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution. Plaintiffs also assert federal employees have a property interest in their salary, and FEPCA's arbitrary exclusion of Hawaii and Alaska federal employees from receiving locality pay violates substantive due process under the Fifth Amendment. The parties now cross move for summary judgment. Plaintiffs contend that because FEPCA affects employees' fundamental right to interstate travel by penalizing federal employees who move to Hawaii or Alaska, FEPCA's exclusion of Hawaii and Alaska employees is subject to strict scrutiny. Plaintiffs also argue the exclusion violates the Privileges and Immunities Clause because the federal government is making a benefits distinction based solely on an employee's state of residence, which also subjects the statute to strict scrutiny review. Plaintiffs further argue that under strict scrutiny review, Defendants

cannot show the exclusion is narrowly tailored to serve a compelling governmental interest. Moreover, Plaintiffs argue that even if the statute is subject to rational basis review, the statute lacks a rational basis to support the exclusion's constitutionality.

Defendants argue FEPCA does not impinge on any of the recognized aspects of the right to interstate travel, and therefore only rational basis review applies. Defendants suggest several rational justifications exist for the exclusion. For example, Defendants argue that because Hawaii and Alaska employees receive the tax-free COLA, Congress may have concluded these employees need not be included in the locality pay program. Defendants also argue Congress may have been motivated by an interest in limiting federal spending or by legislative convenience in not revising the COLA system. Finally, Defendants argue Congress rationally could have decided locality pay was unnecessary to recruit and retain employees in Hawaii and Alaska. With respect to the Privileges and Immunities Clause, Defendants argue Plaintiffs did not raise this claim in the First Amended Complaint. On the merits of the claim, Defendants argue the Clause applies only to the several States, and not to the federal government. Finally, Defendants note that Plaintiffs have abandoned their substantive due process claim in count two of the First Amended Complaint.

II. EVIDENTIARY OBJECTION

Defendants offer as evidence of Congress's purpose in excluding Hawaii and Alaska from FEPCA an OPM memo dated January 1991 in which the Associate Director for Personnel Systems and Oversight stated Hawaii and Alaska "were intentionally excluded from FEPCA because congressional staff

repeatedly asked for assurance that the COLA program would not be touched as party of pay reform." (Defs.' Mot. for Summ. J. [Doc. #80], Ex. 11 at 8.) Defendants also present a May 1994 letter from Alaska Senator Ted Stevens and Hawaii Senator Daniel K. Inouye to the Director of OPM in which the Senators stated, "We are absolutely convinced that the standard locality pay program as applied in the continental United States cannot be fairly applied to our two states, given their high cost of living, remoteness, isolation, and other unique characteristics." (Defs.' Mot. for Summ. J., Ex. 12.) The Senators also stated they believed "there is some value in comparing the effect and operation of the locality pay and COLA programs." (*Id.*) The Senators suggested the Bureau of Labor Statistics conduct locality pay surveys in Hawaii and Alaska "so that the relationship, if any, between the locality pay program and the COLA program can be explored." (*Id.*)

Plaintiffs object to this evidence. Plaintiffs note the 1991 memo was written by an OPM employee, not a congressional representative, after FEPCA was enacted. The 1991 memo thus is the employee's out of court statement which further contains an additional layer of unidentified congressional staffers' alleged out-of-court statements. Plaintiffs also argue the 1994 letter by the Senators was written after FEPCA's enactment and thus has little, if any, relevance to legislative intent at the time of FEPCA's enactment. Further, Plaintiffs argue the 1994 letter does not suggest Hawaii and Alaska opted out of the locality pay program. Rather, the letter indicates the Senators believed applying the locality pay system to their states required research and further analysis, including an examination of the relationship between the locality pay program and COLAs.

The Court finds the 1991 memo and the 1994 letter have no relevance to the issues before the Court. The 1991 memo was written after FEPCA's enactment by an OPM employee who mentions out-of-court statements by unidentified congressional staffers. The Senators' letter was written in 1994, four years after FEPCA's enactment, by two Senators. Remarks by only two legislators, statements by unidentified congressional staffers, and after the fact statements are of little relevance to demonstrate congressional rationale at the time of FEPCA's enactment. Further, the 1994 letter does not state the exclusion in FEPCA was due to any particular policy choice by Congress. The Court therefore will not consider the 1991 memo or the 1994 letter in reviewing FEPCA's constitutionality.

III. MERITS

A. Substantive Due Process (count two)

Count two of Plaintiffs' First Amended Complaint alleges federal employees have a property right in their salary. Plaintiffs allege that federal employees working in CONUS and receiving locality pay who are transferred to a federal job in Hawaii or Alaska lose their locality pay. Plaintiffs argue this deprivation of locality pay violates substantive due process under the Fifth Amendment to the Constitution.

Defendants move for summary judgment on this claim, arguing Plaintiffs cannot show federal employees have a property interest in future locality pay. In their papers, Plaintiffs did not respond to Defendants' arguments regarding count two's substantive due process claim, and at the hearing in this matter, Plaintiffs conceded Defendants were entitled to summary judgment on count two.

"The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that . . . interferes with rights implicit in the concept of ordered liberty." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 996-97 (9th Cir. 2007) (quotation omitted). To establish a substantive due process claim, a plaintiff first must show a constitutionally-protected liberty or property interest. *Id.* To have a property interest, an individual must have "a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law." *Stiesberg v. State of Cal.*, 80 F.3d 353, 356 (9th Cir. 1996). The language of the relevant source of law and the extent to which it expresses the alleged entitlement in mandatory terms inform whether an individual has a reasonable expectation of entitlement. *Id.*

Here, a federal employee could not have a reasonable expectation of entitlement to locality pay in Hawaii or Alaska because FEPCA specifically precludes locality pay in those locations. Consequently, any employee working or transferring to these states would have no reasonable expectation of locality pay. Furthermore, while a federal employee has a property interest in payment of wages for services already performed, Congress may reduce prospectively federal employees' pay. *United States v. Larionoff*, 431 U.S. 864, 879 (1977). Because Congress could abolish locality pay tomorrow for all future pay, federal employees have no property interest in prospective payment of locality pay. Plaintiffs concede they are not entitled to relief on their substantive due process claim. The Court therefore will grant summary judgment in Defendants' favor on count two of the First Amended Complaint.

B. Equal Protection (count one)

The Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment's Equal Protection Clause applies to the federal government through the Fifth Amendment's Due Process Clause. *Cordes v. Gonzales*, 421 F.3d 889, 896 (9th Cir. 2005). A statute triggers equal protection analysis when it treats "similarly situated persons disparately." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002). FEPCA on its face distinguishes between federal employees in Hawaii and Alaska and CONUS federal employees, and results in Hawaii and Alaska employees being treated differently in terms of not receiving locality pay with the attendant effects on retirement contributions and annuities. Plaintiffs therefore have shown FEPCA triggers equal protection review.

To decide whether a law violates the Equal Protection Clause, the reviewing court first must determine the appropriate level of scrutiny to apply. *Giannini v. Real*, 911 F.2d 354, 358 (9th Cir. 1990). Once the appropriate level of review is determined, the Court analyzes the governmental interests involved to determine whether the challenged statute survives review. *Dunn v. Blumstein*, 405 U.S. 330, 343-60 (1972).

1. Level of Review

When the challenged statute burdens a fundamental right or targets a suspect class, the statute is subject to strict scrutiny and must be "'suitably tailored to serve a compelling state interest." *Silveira*, 312 F.3d at 1087-88 (quoting *City of Cleburne v.*

Cleburne Living Ctr., 473 U.S. 432, 440 (1986)); *Romer v. Evans*, 517 U.S. 620, 631 (1996). If the statute "neither affects the exercise of a fundamental right, nor classifies persons based on protected characteristics,' then that statute is subject to rational basis review and "will be upheld 'if the classification drawn by the statute is rationally related to a legitimate state interest." *Silveira*, 312 F.3d at 1088 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)).

It is clear no suspect classification is at issue here and Plaintiffs do not argue they belong to a suspect class. Rather, Plaintiffs argue FEPCA violates equal protection by drawing an unconstitutional distinction between federal employees based on their state of residence which burdens their fundamental right to travel under the Fifth Amendment's Due Process Clause. Although not expressly set forth in the Constitution, the right to interstate travel is a fundamental constitutional right. *Saenz v. Roe*, 526 U.S. 489, 498-99 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *United States. v. Guest*, 383 U.S. 745, 757-58 (1966). The Supreme Court has not always identified the source of this right, sometimes referring to the federal character of our nation and historical context, the Fourteenth Amendment, the Fifth Amendment's Due Process Clause, Article IV's Privileges and Immunities Clause,[1] and the Commerce Clause. *See Saenz*,

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[1] As the Court clarified at the hearing on these motions, Plaintiffs' argument related to Article IV's Privileges and Immunities Clause is a component of Plaintiffs' right to travel and equal protection claim, and Plaintiffs do not attempt to assert an independent claim under Article IV.

526 U.S. at 500-03; *Guest*, 383 U.S. at 759; *Shapiro*, 394 U.S. at 630 n.8.

Although most cases involving the right to travel have involved challenges to state statutes, the right to travel also limits the national government's powers. As the Supreme Court noted in *Saenz*, Congress may not authorize the States to violate the right to travel as expressed in the Fourteenth Amendment, and furthermore "the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States." 526 U.S. at 507-08; *see also Kent v. Dulles*, 357 U.S. 116, 125 (1958) (stating, in a case involving the right to international travel, that the right to travel is a "part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment"). The Court therefore rejects Defendants' argument that the right to travel does not apply to the national government. The Supreme Court has indicated the right to travel is a limitation on the national government's power, and the sources of the recognized right to travel—the federal character of the nation, the citizenship clause of the Fourteenth Amendment, and the Fifth Amendment's due process clause—apply to the national government as well as the states.

Furthermore, it would be anomalous if the national government was prohibited from empowering the several states to interfere with the right to travel but it could impair the right itself directly. It also would be incongruous if the national government was bound to respect the lesser constitutional liberty of international travel, but would be free to set up barriers to the "virtually unqualified" right to interstate travel.

See Haig v. Agee, 453 U.S. 280, 307 (1981) ("The constitutional right of interstate travel is virtually unqualified. By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' . . . can be regulated within the bounds of due process."); *Zemel v. Rusk*, 381 U.S. 1, 13-14 (1965) (reviewing federal passport restrictions on travel to Cuba); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964) (reviewing federal passport restrictions on communists).

Because the right to travel applies to the national government, the Court next must determine whether FEPCA implicates the right sufficiently to trigger strict scrutiny review. The Supreme Court has articulated "at least" three recognized aspects of the right to interstate travel:

> [T]he right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz, 526 U.S. at 500.

Plaintiffs' challenge to FEPCA does not fit within any of the three recognized components of the right to travel. First, FEPCA does not directly impair the exercise of the right of free ingress and regress to and from neighboring states. *Compare Edwards v. California*, 314 U.S. 160 (1941) (invalidating a California statute making it a misdemeanor to bring an indigent person into the state) with *Saenz*, 526 U.S. at 501

(concluding state statute imposing durational residency requirement on receiving welfare benefits did not impair free movement between the states under the first component of the right to travel). Plaintiffs own affidavits demonstrate Plaintiffs have been able to move freely between the states.

FEPCA also does not implicate the second component of the right to travel FEPCA makes no distinction between temporary visitors and permanent residents, and it treats all persons within a particular state the same. Finally, FEPCA does not implicate the third component of the right to travel which permits the newly arrived citizen to the enjoy the same privileges and immunities other citizens of the same State enjoy. FEPCA does not implicate this third prong because FEPCA treats all persons within a particular state the same, whether newly arrived or long time residents.

Even if the right to travel's contours extend beyond these three components, the Supreme Court has made clear that the type of claim Plaintiffs assert here is not protected by the right to travel. First, it is not the act of traveling that triggers the exclusion. Whether one recently arrived to Hawaii or lived there his entire life, he still is not entitled to locality pay. FEPCA's exclusion of Hawaii and Alaska federal employees from locality pay therefore does not penalize "those persons, and only those persons, who have exercised their constitutional right of interstate migration." *Dunn*, 405 U.S. at 339-342 & n.12 (giving an example of an interstate migrant losing his driver's license because the new State has a higher age requirement, but stating such a situation does not raise a right to travel issue because the new state's age requirement "is not a penalty imposed

solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.").

For those federal employees who have exercised their right to travel to Hawaii or Alaska, or were deterred by FEPCA from doing so, the Supreme Court expressly has rejected the proposition that the right to interstate travel includes the right to receive the same level of benefits in the citizen's new state as the citizen enjoyed in the former state of residence. In *Califano v. Gautier Torres*, the Supreme Court upheld the constitutionality of an amendment to the Social Security Act making Supplemental Security Income ("SSI") benefits payable only to residents of the United States, defined as the fifty States and the District of Columbia. 435 U.S. 1, 1-5 (1978). The amendment specifically excluded persons in Puerto Rico from being eligible for SSI benefits. *Id.* at 2. The plaintiffs received SSI benefits while residing in one of the fifty states, but the benefits were discontinued when they moved to Puerto Rico. *Id.* at 2-3.

In considering the plaintiffs' argument that the cessation of benefits upon their move to Puerto Rico violated their right to travel, the Supreme Court cited prior case law for the proposition that "laws prohibiting newly arrived residents in a State or county from receiving the same vital benefits as other residents unconstitutionally burden[] the right of interstate travel." *Id.* at 4. However, the Supreme Court held that by invalidating the exclusion of persons in Puerto Rico from receiving SSI benefits, the district court:

> altogether transposed that proposition. It held that the Constitution requires that a person who travels to Puerto Rico must be given benefits

> superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came. This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now. footnote omitted Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there. And the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents.

Id. at 4-5; *Cf. Fisher v. Reiser*, 610 F.2d 629, 631 (9th Cir. 1979) (upholding under rational review a Nevada workers' compensation law granting cost-of-living increases to beneficiaries who continued to reside in Nevada, but denying the increased benefits to beneficiaries residing outside Nevada). In making this determination, the Supreme Court assumed the plaintiffs enjoyed the "virtually unqualified" constitutional right to interstate travel when they traveled between Puerto Rico and any of the fifty States, rather than the liberty interest in international travel. *Id.* at 5 n.6.

Califano rejected the proposition that the right to interstate travel requires the federal government to provide to a citizen all federal benefits for which he was eligible by reason of his residence in one state when that citizen moves to another state within which he becomes ineligible for the federal benefit. Consequently, the fact that a federal employee may

receive locality pay in one state of residence and lose that locality pay when he moves to Hawaii or Alaska does not burden the right to interstate travel Because FEPCA does not burden a fundamental right, rational basis review applies.

2. Rational Basis Review

Under rational review, there must be "some rational connection between the state's objective for its legislative classification and the means by which it classifies its citizens." *Silveira*, 312 F.3d at 1088; *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). The legislature need not actually articulate the supporting rationale, and the record need not contain empirical evidence supporting the classification, so long as the legislative choice is reasonable. *Silveira*, 312 F.3d at 1089; *Heller*, 509 U.S. at 320. The challenged statute is presumptively constitutional and the party attacking the statute bears the burden of negating "every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (quotation and internal citation omitted).

"[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 320 (quotation omitted). Instead, the party challenging the statute must demonstrate that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Further, the statute need not employ a perfect fit between means and ends. *Heller*, 509 U.S. at 321. A statutory classification does not violate the Equal Protection Clause "simply because the classification is not made with mathematical

nicety or because in practice it results in some inequity." *Schweiker*, 450 U.S. at 234 (quotation omitted).

The rational basis test is a "relatively relaxed" standard in recognition of Congress's role as "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Silveira*, 312 F.3d at 1088; *Schweiker*, 450 U.S. at 230. In such circumstances, the Constitution presumes the democratic process eventually will correct improvident decisions. *City of Cleburne*, 473 U.S. at 440. Although the rational basis test is deferential, it is not "toothless." *Id.* (quotation omitted). A link between the classification and the governmental objective must exist. *Romer*, 517 U.S. at 632.

Defendants offer four rational bases for upholding FEPCA: (1) Congress rationally could have decided Hawaii and Alaska employees did not need locality pay because they received the tax-free COLAs; (2) to conserve the public fisc; (3) "legislative convenience"; and (4) Congress could have decided locality pay was not needed to recruit and retain employees in Hawaii and Alaska. Plaintiffs argue none of these bases are rational. As to the COLA, Plaintiffs argue the COLA is aimed at cost of living, not pay disparities between public and private sector employees. Plaintiffs note that the COLA is determined based on different factors than locality pay, which further demonstrates these two supplements are aimed at remedying different problems. Plaintiffs therefore argue Congress could not rationally have determined COLAs would address the private and public pay disparity that FEPCA was designed to address. As to conserving the public fisc, Plaintiffs argue Congress cannot rationally decide to burden employees in two states

with pay disparities in the name of conserving public resources. As to legislative convenience, Plaintiffs contend Defendants do not really explain what they mean by this. Finally, Plaintiffs contend recruitment and retention are not FEPCA's goals; reducing public and private sector pay disparities are, and thus recruitment and retention issues are not rationally related to the statutory exclusion in FEPCA. Plaintiffs also argue no evidence in the record supports the conclusion that no such pay disparity existed in Hawaii and Alaska.

Like Plaintiffs, the Court is puzzled by the legislative anomaly that here operates to the life-long disadvantage of federal employees in the excluded states. For example, FEPCA does not state that it will exclude from its coverage any pay locality eligible for a COLA. Rather, it excludes Hawaii and Alaska by name.

Indeed, if Congress abolished COLAs, Hawaii and Alaska federal employees still would be excluded from FEPCA's coverage because the statute's classification is defined by state residence, not the receipt of COLAs.

Further, Hawaii and Alaska employees have received COLAs since the 1940s, long before FEPCA's enactment, due to increased living costs. The COLA purportedly is aimed at ensuring Hawaii and Alaska employees have comparable buying power as federal employees in Washington D.C. Consequently, prior to FEPCA's enactment, federal employees in Hawaii and Alaska were on the same level as federal employees in Washington D.C. However, FEPCA gives federal employees in Washington D.C. an additional supplement to base pay in the form of locality pay that it does not give to federal employees in

Hawaii and Alaska. This historical context calls into question Defendants' argument that COLA is a tradeoff for FEPCA's locality pay.

That COLA is not simply a substitute for FEPCA's locality pay is further demonstrated by the fact that the two pay supplements are aimed at remedying different compensation issues, and are calculated differently as well. Nothing about the COLA's purpose or manner of calculation suggests a nexus between the COLA and the reduction of a pay disparity between public and private sector compensation in Hawaii and Alaska.

Additionally, federal employees' state of residence bears no rational relationship to excluding them from locality pay to conserve the public fisc. *See Saenz*, 526 U.S. at 507. Neither do Defendants adequately explain what they mean in arguing Congress could have been motivated by "legislative convenience" in the context of this case. *Vance v. Bradley*, 440 U.S. 93, 109 (1979).

Notwithstanding these weaknesses in the arguments advanced by Defendants, when applying the rational basis test, the Court is guided by the Supreme Court's admonition that:

> rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices'. . . . Nor does it authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a

> strong presumption of validity [and] must be upheld against an equal protection challenge if is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Heller, 509 U.S. at 319-20 (internal citations omitted). Under this standard, the Court finds Plaintiffs have not met their burden of overcoming the presumption that FEPCA is constitutional and showing FEPCA's exclusion of Hawaii and Alaska employees was not rationally related to a legitimate governmental interest at the time it was enacted.

Congress has a legitimate interest in creating and managing compensation packages for its employees to compensate employees adequately, to recruit and retain employees, and to allocate limited resources among employees. That Congress may have discharged its legislative responsibilities imperfectly does not give this Court fiat to rewrite the legislation to rectify the current disparity. It suggests strongly instead that Congress should correct the incongruity made so evident by this case.

FEPCA excludes from the locality pay system only those two states in which federal employees also receive the tax free COLA. At the time FEPCA was enacted, Hawaii and Alaska employees received COLA pay allowances up to 25% of their base salary. Congress rationally could have decided employees who received this tax free allowance did not also need to receive locality pay.

The statistics regarding pay gaps as recently compiled by the Bureau of Labor Statistics supports this conclusion. The Bureau compared the General Schedule pay rate to non-federal pay rates, and

consequently the statistics in the report do not include either COLAs or locality pay. (Pl.'s Opp'n, Ex. M at 1.) According to the report, the pay gap between General Schedule salaries and non-federal salaries in Washington D.C. in March 2006 was 61.64%. (*Id.*, Ex. M Attach. 1.) The same report shows Honolulu had a pay gap of 41.72% and Anchorage had a pay gap of 54.96%. (*Id.*) When locality pay is included, Washington D.C.'s pay gap drops to 43.05% (61.64% minus 18.59% locality pay). *See* Exec. Order 13420, 71 Fed. Reg. 77,571, 77,580 Sched. 9. When COLAs are included, Honolulu's pay gap drops to 16.72% (41.72% pay gap minus 25% COLA) and Anchorage's pay gap drops to 30.96% (54.96% pay gap minus 24% COLA), not including any further reduction in the pay gap given the COLA's tax-free status. The pay disparities after factoring in COLAs in Honolulu and Anchorage are in line with other CONUS areas after factoring in locality pay. Atlanta, Boston, Buffalo, Chicago, Dallas, Hartford, Los Angeles, Minneapolis, New York, Philadelphia, Phoenix, Sacramento, and San Diego also had greater than 20% disparity even after including locality pay. San Francisco had over a 30% private versus public pay disparity even after factoring in locality pay. (Compare Pls.' Opp'n, Ex. M, Attach 2 with Sched. 9.)

Although FEPCA and COLAs may be directed at different aims, Congress need not act with mathematical precision, and a statute need not have a perfect fit between ends and means. When FEPCA was enacted, Congress rationally could have concluded the two pay supplements were roughly parallel, even if it has turned out, in practice, that FEPCA's exclusion has worked to the disadvantage of Hawaii and Alaska employees with respect to their retirement benefits.

FEPCA also survives rational basis review under the related reason that Congress rationally may have determined locality pay was not needed in these states to recruit and retain employees. FEPCA's policy of pay equalization between the public and private sector is related to recruitment and retention of employees, for the federal government would have difficulty recruiting and retaining quality employees if federal employment did not offer competitive compensation. Although Plaintiffs argue no evidence in the record shows Congress rationally could have concluded locality pay was unnecessary in Hawaii and Alaska, Plaintiffs cannot rely on a lack of evidence supporting Congress's decision. On rational basis review, Plaintiffs bear the burden of showing Congress could not reasonably have conceived locality pay was unnecessary to recruit and retain employees in Hawaii and Alaska. Plaintiffs have presented no evidence the federal government had difficulty recruiting or retaining employees in Hawaii and Alaska at the time of FEPCA's enactment. Plaintiffs therefore have not met their burden of negating every conceivable rational basis for the exclusion.

FEPCA's exclusion reflects a policy choice by the politically accountable branches of government. While the Court acknowledges the inequities resulting from Plaintiffs' exclusion from the locality pay system, the proper venue for resolving the issue remains with Congress.

Because FEPCA is supported by a rational basis, FEPCA does not violate the Equal Protection Clause. The Court therefore must grant Defendants' motion for summary judgment, and will deny Plaintiffs' motion for summary judgment.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. #82/#86) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Doc. #80) is hereby GRANTED. Judgment is hereby entered in favor of Defendants and against Plaintiffs.

DATED: January 30, 2008

/s/ PHILIP M. PRO
PHILIP M. PRO[2]
United States District Judge

[2] United States District Judge for the District of Nevada, sitting by designation.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-15553
D.C. No. 05-CV-000398-PMP

JOYCE K. MATSUO; SHARON WARREN; RONALD FRANKLIN; FRANK HARDT; RUSSELL HOLLAND; ROY MATSUO; MICHAEL MCCRARY; FRED NOLKE; CHARLES ROBERTS; RONALD SCHERLER; ROMAN BUYSON; PETER NEWMAN; THOMAS WARREN; JOHN J. KATO; MICHAEL C. SHEARER, on behalf of themselves and others similarly situated,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; LINDA M. SPRINGER,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii

Philip M. Pro, District Judge, Presiding
Argued and Submitted
May 13, 2009-Honolulu, Hawaii
Filed November 12, 2009

Before: Alex Kozinski, Chief Judge, Jay S. Bybee and Consuelo M. Callahan, Circuit Judges.

Opinion by Chief Judge Kozinski

COUNSEL

Briefed and argued by Gregory K. McGillivary, Woodley & McGillivary, Washington, D.C., for the plaintiffs-appellants.

Argued by Michael Raab, Civil Appellate Division, U.S. Department of Justice, Washington, D.C., who was joined on the briefs by Gregory G. Katsas, Assistant Attorney General, Washington, D.C.; Edward H. Kubo, Jr., United States Attorney, Honolulu, Hawaii, and Mark R. Freeman, Civil Appellate Division, U.S. Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

KOZINSKI, Chief Judge:

We decide whether the Federal Employees Pay Comparability Act of 1990, 5 U.S.C. § 5301 *et seq.*, imposes an unconstitutional burden on the right to travel.

Facts

The Federal Employees Pay Comparability Act (the Act) provides certain federal employees in the contiguous 48 states with what is known as locality pay-an amount they are paid in addition to salary in order to equalize their compensation with that of other employees in the same region. 5 U.S.C. §§ 5301, 5304(f)(1)(A). The Office of Personnel Management establishes the amount of locality pay based on the degree of public-private pay disparity in each region. *See* 5 C.F.R. §§ 531.601-611. For example, this year federal employees in the New York City area will

receive a locality adjustment equal to 27.96% of their base salary, while those in Atlanta will receive 18.55%. U.S. Office of Personnel Mgmt., *2009 General Schedule Locality Pay Tables*, http://opm.gov/oca/09tables/pdf/saltbl.pdf. Locality pay is included in the calculation of retirement benefits.

Roy Matsuo is a federal employee in Hawaii and is therefore ineligible for locality pay. 5 U.S.C. § 5304(f)(1)(A). Matsuo claims that, by denying him this benefit, the Act penalizes him for working in Hawaii, and this unconstitutionally burdens his right to travel.

Charles Roberts works in Maryland and, like most other federal employees in the 48 contiguous states, receives locality pay. He'd lose it if he returned to Hawaii, where he was a federal employee for a number of years before moving to Maryland. He claims that this unconstitutionally burdens his right to travel.

The parties stipulated to the certification of two classes[1]—one representing the Matsuos of the federal workforce, the other representing the Robertses—after which they filed cross-motions for summary judgment and the district court denied plaintiffs relief. Plaintiffs appeal.

Analysis

We must determine whether the Act "actually deters . . . travel" or "uses any classification which serves to penalize the exercise of that right." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986)

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[1] The propriety of class certification is not before us, so we have no occasion to pass on it.

(plurality opinion) (internal quotation marks and citations omitted).[2]

[1] 1. Plaintiffs contend that federal employees in Alaska and Hawaii are compensated less than those on the mainland. The Act gives most federal employees, but not those stationed in Alaska and Hawaii, a minimum salary supplement of 13.86%; some get as much as 34.35%. U.S. Office of Personnel Mgmt., 2009 General Schedule Locality Pay Tables, http://opm.gov/oca/09tables/pdf/saltbl.pdf. Employees outside the 48 contiguous states get nothing under the Act.

[2] Federal employees in Alaska and Hawaii do receive a geographically determined pay supplement called a cost-ofliving allowance. 5 U.S.C. § 5941(a). This tax-free salary adjustment, first provided in some form in 1948, is only available to employees stationed outside the 48 contiguous states, and it's intended to compensate for the higher costs associated with living far from the mainland. *See* 13 Fed. Reg. 5453 (Sept. 16, 1948). This year employees in Alaska will receive a tax-free supplement equal to 23-25% of their salary, and those in Hawaii will receive 18-25%. U.S. Office of Personnel Mgmt., *Non-Foreign Area Cost-of-Living Allowances*, http://www.opm.gov/oca/cola/html/C-rates.asp.

[3] 2. In light of the above, federal employees (li Matsuo) who are now working in Alaska and Hawaii can't make the necessary threshold showing. The Act imposes no travel penalty on them; if anything, it imposes a penalty for staying put. In fact, the Act

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[2] Plaintiffs have provided no evidence that "impeding travel is [the Act's] primary objective," so we won't address that final prong of *Soto-Lopez*. *See* 476 U.S. at 903.

encourages these employees to travel by providing superior pay in the 48 contiguous states.[3] They therefore lack standing to bring a right-to-travel claim. *See Int'l Org. of Masters, Mates & Pilots v. Andrews*, 831 F.2d 843, 846 (9th Cir. 1987).

[4] The plaintiffs in *Andrews* were Washington residents who worked on Alaska's Marine Highway System and were paid less than their counterparts in Alaska. *Id.* at 844-45. They claimed that an Alaska statute was to blame for this disparity and that it violated their right to travel. *Id.* at 846. We held they had no standing to challenge the law because it didn't affect their "freedom to leave" Washington. *Id.* Similarly, plaintiffs who've always worked in Alaska or Hawaii have no standing to challenge the Act. They may be paid less than their counterparts in the 48 contiguous states, but the Act doesn't affect their "freedom to leave" Alaska or Hawaii.

[5] 3. Plaintiffs (like Roberts) who work in the 48 contiguous states are in a different position. They would lose locality pay if they moved to Alaska or Hawaii and continued to work for the federal government,[4] so traveling would arguably trigger a penalty.[5] But not everything that deters travel

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[3] Moving between Alaska and Hawaii or to any location other than the mainland imposes no penalty. Federal employees in all of these places are governed by the same compensation scheme. *See* p. 15227 *supra*.

[4] Nothing prevents them from taking a locality-paying private-sector job. And there is, of course, no constitutional right to federal employment wherever one chooses to live. It's therefore not clear that these plaintiffs are suffering a cognizable injury at all.

[5] These employees would gain the benefit of the tax-free cost-of-living allowance. *See* p. 15227 *supra*. But, as plaintiffs appear

burdens the fundamental right to travel. States and the federal government would otherwise find it quite hard to tax airports, hotels, moving companies or anything else involved in interstate movement. We turn to *Saenz v. Roe*, 526 U.S. 489 (1999), for guidance about whether the Act's putative deterrent to travel burdens the constitutionally-protected right to travel.

[6] *Saenz* held that, unless a state can satisfy strict scrutiny, the constitutional right to travel prohibits it from: (1) preventing citizens from entering or leaving; (2) treating temporarily-present citizens of other states as "unfriendly aliens" rather than as "welcome visitors"; or (3) discriminating against citizens of other states who elect to become permanent residents. *Id.* at 500. But the states have no role in determining the compensation of federal employees. Neither can we say that the Act was an effort by Congress to "authorize the States to violate" one of these strictures. *Id.* at 507. The states aren't involved here at all, so the Act doesn't violate the right to travel as defined by *Saenz*.

Plaintiffs place heavy reliance on *Saenz*'s statement that "[t]he 'right to travel' discussed in our cases embraces at least three different components." *Id.* at 500 (emphasis added). While the right might have other components, being provided with the same federal benefits after moving as before isn't among

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to see it, that is compensation for the higher cost of living in Alaska and Hawaii rather than on the mainland-something akin to a travel per diem-so it doesn't count for purposes of comparing salaries. If successful, plaintiffs don't merely intend to receive locality pay while keeping their cost-of-living allowance. They also seek to have their cost-of-living allowance counted towards retirement pay.

them. *See Califano v. Torres*, 435 U.S. 1 (1978) (per curiam).

The plaintiff in *Torres* received Supplemental Security Income (SSI) payments while a resident of Connecticut.[6] 435 U.S. at 2-3. He moved to Puerto Rico and the Social Security Administration terminated his benefits because residents of Puerto Rico aren't eligible for SSI. Like plaintiffs here, he sued claiming that the SSI program violated his right to travel. A three judge district court granted relief, but the Supreme Court reversed. It characterized the district court's order as holding that "a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came." *Id.* at 4. This "altogether transposed" the right to travel, which the Court held merely requires that new residents of a state be given the same benefits as other residents. *Id.*[7]

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[6] SSI is a federally funded program that's directly administered by the federal government. *See* Torres, 435 U.S. at 2. It is thus closely analogous to the compensation program for federal employees.

[7] Puerto Rico does have a "relationship to the United States that has no parallel in our history." *Torres*, 435 U.S. at 3 n.4 (internal quotation marks omitted). That's not, as plaintiffs urge, sufficient to distinguish *Torres*'s discussion of the right to travel. The Court explained that "[f]or purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union," which is how the Court phrased the "right of interstate travel" earlier in its opinion. *Id.* at 4 n.6. The Court only relied on Puerto Rico's unique status to dispose of an equal protection claim. *See id.* at 3 n.4. Such a claim isn't properly before us. *See* note 8 *infra*.

Torres teaches that the right to travel permits the federal government to put new migrants to a state or territory on the same footing as that of long-established citizens. That is all that would occur should a plaintiff like Roberts move from the 48 contiguous states to Alaska or Hawaii. He would be denied locality pay because all federal employees in Alaska and Hawaii are denied locality pay. *Torres* forecloses a right-to-travel claim in such circumstances.

The Eighth Circuit rejected a very similar claim. In *Minnesota Senior Fed'n v. United States*, plaintiffs challenged the geographical disparity in benefits under Medicare Part C. 273 F.3d 805, 810 (8th Cir. 2001). Addressing those plaintiffs' right-to-travel claim, the court held: "In effect, appellants argue that a federal program that fails to achieve nationwide uniformity in the distribution of government benefits is subject to strict scrutiny because it will deter travel to unfavored locales. Such a contention is clearly too broad." *Id.* Otherwise, choices Congress makes every day-where to build a military base, how much to allocate a state in highway funds, whether to provide a tax credit for this or that disaster area-would trigger strict scrutiny. That searching standard of review can't be appropriate merely because a federal program fails to provide geographically uniform benefits. Citizens of every state don't receive uniform benefits under many federal programs. Subjecting all those choices to strict scrutiny would undermine our constitutional scheme, which accords Congress primacy in spending decisions.

[7] 4. Plaintiffs next contend that, even if the Act doesn't burden their fundamental right to travel, it must still be rationally related to a legitimate

governmental interest. There is not, however, a free-floating requirement that all congressional action be rational. Unless a law creates a classification that plaintiffs complain denies them equal protection (and plaintiffs here have abandoned such a claim[8]) or the law burdens a liberty or property interest, Congress is free to act without being second-guessed by the courts. Without a right to government employment in the first place, which plaintiffs don't argue exists, federal employees can have no judicially enforceable interest in pay at a particular rate. "The whole control of [federal employees' pay] is within the domain of congressional power." *Frisbie v. United States*, 157 U.S. 160, 166 (1895).[9]

AFFIRMED.

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[8] On appeal, plaintiffs don't claim that the Act's classification of employees based on the state in which they work is itself a denial of equal protection; they only claim this classification impermissibly burdens their right to travel. A claim based on the right to travel is distinct from an equal protection claim. *See, e.g., Torres*, 435 U.S. at 3 n.4. Briefing the former doesn't properly raise the latter. *See, e.g., Andrews*, 831 F.2d at 845 n.2. Even if we were to construe plaintiffs' brief as raising this claim, the Act clearly satisfies rational-basis scrutiny for the reasons stated by the district court.

[9] Congress recently saw fit to exercise this power. Federal employees in Alaska and Hawaii will, after a phase-in period, receive locality pay instead of the cost-of-living allowance. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1912, 123 Stat. 2190 (2009).

APPENDIX D

U.S. Const. art. I, sec. 8, cl 3.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

U.S. Const. art. IV, sec. 2, cl 1.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

U.S. Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

U.S. Const. Amend. 14, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

5 U.S.C. § 5301

§ 5301. Policy

It is the policy of Congress that Federal pay fixing for employees under the General Schedule be based on the principles that—

(1) there be equal pay for substantially equal work within each local pay area;

(2) within each local pay area, pay distinctions be maintained in keeping with work and performance distinctions;

(3) Federal pay rates be comparable with non-Federal pay rates for the same levels of work within the same local pay area; and

(4) any existing pay disparities between Federal and non-Federal employees should be completely eliminated.

* * *

5 U.S.C. § 5304

§ 5304. Locality-based comparability payments

(a) Pay disparities shall be identified and reduced as follows:

(1) Comparability payments shall be payable within each locality determined to have a pay disparity greater than 5 percent.

(2) (A) The localities having pay disparities, and the size of those disparities, shall, for purposes of any comparability payment scheduled to take effect in any calendar year, be determined in accordance with the appropriate report, as prepared and submitted to the President under subsection (d)(1) for purposes of such calendar year.

(B) Any computation necessary to determine the size of the comparability payment to become payable for any locality in a year (as well as any determination as to the size of any pay disparity remaining after that comparability payment is made) shall likewise be made using data contained in the appropriate report (described in subparagraph (A)) so prepared and submitted for purposes of such calendar year.

(3) Subject to paragraph (4), the amount of the comparability payments payable under this subsection in a calendar year within any locality in which a comparability payment is payable shall be computed using such percentage as the President determines for such locality under subsection (d)(2), except that—

(A) the percentage for the first calendar year in which any amounts are payable under this section may not be less than 1/5 of the amount needed to reduce the pay disparity of the locality involved to 5 percent;

(B) the percentage for the second calendar year in which any amounts are payable under this section may not be less than 3/10 of the amount needed to reduce the pay disparity of the locality involved to 5 percent;

(C) the percentage for the third calendar year in which any amounts are payable under this section may not be less than 2/5 of the amount needed to reduce the pay disparity of the locality involved to 5 percent;

(D) the percentage for the fourth calendar year in which any amounts are payable under this section may not be less than 1/2 of the amount needed to

reduce the pay disparity of the locality involved to 5 percent;

(E) the percentage for the fifth calendar year in which any amounts are payable under this section may not be less than 3/5 of the amount needed to reduce the pay disparity of the locality involved to 5 percent;

(F) the percentage for the sixth calendar year in which any amounts are payable under this section may not be less than 7/10 of the amount needed to reduce the pay disparity of the locality involved to 5 percent;

(G) the percentage for the seventh calendar year in which any amounts are payable under this section may not be less than 4/5 of the amount needed to reduce the pay disparity of the locality involved to 5 percent;

(H) the percentage for the eight calendar year in which any amounts are payable under this section may not be less than 9/10 of the amount needed to reduce the pay disparity of the locality involved to 5 percent; and

(I) the percentage for the ninth calendar year in which any amounts are payable under this section, and any year thereafter, may not be less than the full amount necessary to reduce the pay disparity of the locality involved to 5 percent.

(4) Nothing in this section shall be considered to preclude the President, in his discretion, from adjusting comparability payments to a level higher than the minimum level otherwise required in a calendar year, including to the level necessary to eliminate a locality's pay disparity completely.

(b) After the ninth calendar year (referred to in subsection (a)(3)(I)), the level of comparability payments payable within such locality may be reduced for any subsequent calendar year, but only if, or to the extent that, the reduction would not immediately create another pay disparity in excess of 5 percent within the locality (taking into consideration any comparability payments remaining payable).

(c) (1) The amount of the comparability payment payable within any particular locality during a calendar year—

(A) shall be stated as a single percentage, which shall be uniformly applicable to General Schedule positions within the locality; and

(B) shall, for any employee entitled to receive a comparability payment, be computed by applying that percentage to such employee's scheduled rate of basic pay (or, if lower due to a limitation on the rate payable, the rate actually payable), subject to subsection (g).

(2) A comparability payment—

(A) shall be considered to be part of basic pay for purposes of retirement under chapter 83 or 84 [5 USCS §§ 8301 et seq. or 8401 et seq.], as applicable, life insurance under chapter 87 [5 USCS §§ 8701 et seq.], and premium pay under subchapter V of chapter 55 [5 USCS §§ 5541 et seq.], and for such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe; and

(B) shall be paid in the same manner and at the same time as the basic pay payable to such

employee pursuant to any provision of law outside of this section.

(3) Nothing in this subchapter [5 USCS §§ 5301 et seq.] shall be considered to permit or require that any portion of a comparability payment be taken into account for purposes of any adjustment under section 5303 [5 USCS § 5303].

(4) (A) Only employees receiving scheduled rates of basic pay (subject to any pay limitation which may apply) shall be eligible for comparability payments under this section.

(B) Comparability payments shall not be payable for service performed in any position which may not, under subsection (f)(1)(A), be included within a pay locality.

(d) In order to carry out this section, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under subsection (e) (but not later than 13 months before the start of the calendar year for purposes of which it is prepared), a report that—

(A) compares the rates of pay under the General Schedule (disregarding any described in section 5302(8)(C) [5 USCS § 5302(8)(C)]) with the rates of pay generally paid to non-Federal workers for the same levels of work within each pay locality, as determined on the basis of appropriate surveys that shall be conducted by the Bureau of Labor Statistics;

(B) based on data from such surveys, identifies each locality in which a pay disparity exists and specifies the size of each such pay disparity (before

and after taking into consideration any comparability payments payable);

(C) makes recommendations for appropriate comparability payments, in conformance with applicable requirements of this section; and

(D) includes the views and recommendations submitted under subsection (e);

(2) after considering the report of his agent (including the views and recommendations referred to in subsection (e)(2)(C), provide for or adjust comparability payments in conformance with applicable requirements of this section, effective as of the beginning of the first applicable pay period commencing on or after January 1 of the applicable year; and

(3) transmit to Congress a report of the actions taken under paragraph (2) (together with a copy of the report submitted to him by his agent, including the views and recommendations referred to in subsection (e)(2)(C)) which shall—

(A) identify ~~each~~ pay locality;

(B) specify which localities have pay disparities in excess of 5 percent, and the size of the disparity existing in each of those localities, according to the pay agent's most recent report under paragraph (1) (before and after taking into consideration any comparability payments payable); and

(C) indicate the size of the respective comparability payments (expressed as percentages) which will be in effect under paragraph (2) for the various pay localities specified under subparagraph (B) for the applicable calendar year.

(e) (1) The President shall establish a Federal Salary Council of 9 members, of whom—

(A) 3 shall be chosen from among persons generally recognized for their impartiality, knowledge, and experience in the field of labor relations and pay policy; and

(B) 6 shall be representatives of employee organizations which represent substantial numbers of employees holding General Schedule positions, and who shall be selected giving due consideration to such factors as the relative numbers of employees represented by the various organizations, except that not more than 3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations.

Members of the Council shall not receive pay by reason of their service on the Council, nor shall members who are not otherwise employees of the United States be considered employees by reason of any such service. However, members under subparagraph (A) may be paid expenses in accordance with section 5703 [5 USCS § 5703]. The President shall designate one of the members to serve as Chairman of the Federal Salary Council. One of the 3 members under subparagraph (A) may be the Chairman of the Federal Prevailing Rate Advisory Committee, notwithstanding the restriction under section 5347(a)(1) [5 USCS § 5347(a)(1)], and such individual may also be designated to serve as Chairman of the Federal Salary Council.

(2) The pay agent shall—

(A) provide for meetings with the Council and give thorough consideration to the views and recommendations of the Council and the individual

views and recommendations, if any, of the members of the Council regarding—

(i) the establishment or modification of pay localities;

(ii) the coverage of the surveys of pay localities conducted by the Bureau of Labor Statistics under subsection (d)(1)(A) (including, but not limited to, the occupations, establishment sizes, and industries to be surveyed, and how pay localities are to be surveyed);

(iii) the process of comparing the rates of pay payable under the General Schedule with rates of pay for the same levels of work performed by non-Federal workers; and

(iv) the level of comparability payments that should be paid in order to eliminate or reduce pay disparities in accordance with the requirements of this section;

(B) give thorough consideration to the views and recommendations of employee organizations not represented on the Council regarding the subjects in subparagraph (A)(i)-(iv); and

(C) include in its report to the President the views and recommendations submitted as provided in this subsection by the Council, by any member of the Council, and by employee organizations not represented on the Council.

(f) (1) The pay agent may provide for such pay localities as the pay agent considers appropriate, except that—

(A) each General Schedule position in the United States, as defined under section 5921(4) [5 USCS § 5921(4)], and its territories and possessions,

including the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands, shall be included within a pay locality; and

(B) the boundaries of pay localities shall be determined based on appropriate factors which may include local labor market patterns, commuting patterns, and practices of other employers.

(2)

(A) The establishment or modification of any such boundaries shall be effected by regulations which, notwithstanding subsection (a)(2) of section 553 [5 USCS § 553], shall be promulgated in accordance with the notice and comment requirements of such section.

(B) Judicial review of any regulation under this subsection shall be limited to whether or not it was promulgated in accordance with the requirements referred to in subparagraph (A).

(g)

(1) Except as provided in paragraph (2), comparability payments may not be paid at a rate which, when added to the rate of basic pay otherwise payable to the employee involved, would cause the total to exceed the rate of basic pay payable for level IV of the Executive Schedule.

(2) The applicable maximum under this subsection shall be level III of the Executive Schedule for—

(A) positions under subparagraphs (A) and (B) of subsection (h)(1);

(B) positions under subsection (h)(1)(C) not covered by appraisal systems certified under subsection 5307(d) [5 USCS § 5307(d)]; and

(C) any positions under subsection (h)(1)(D) as the President may determine.

(3) The applicable maximum under this subsection shall be level II of the Executive Schedule for positions under subsection (h)(1)(C) covered by appraisal systems certified under section 5307(d) [5 USCS § 5307(d)].

(h) (1) For the purpose of this subsection, the term "position" means—

(A) a position to which section 5372 [5 USCS § 5372] applies (relating to administrative law judges appointed under section 3105 [5 USCS § 3105]);

(B) a position to which section 5372a [5 USCS § 5372a] applies (relating to contract appeals board members);

(C) a Senior Executive Service position under section 3132 or 3151 [5 USCS § 3132 or 3151] or a senior level position under section 5376 [5 USCS § 5375] stationed within the United States, but outside the 48 contiguous States and the District of Columbia in which the incumbent was an individual who on the day before the effective date of section 1912 of the Non-Foreign Area Retirement Equity Assurance Act of 2009 was eligible to receive a cost-of-living allowance under section 5941 [5 USCS § 5941] and who thereafter has served continuously in an area in which such an allowance was payable; and

(D) a position within an Executive agency not covered under the General Schedule or any of the preceding subparagraphs, the rate of basic pay for which is (or, but for this section, would be) no more than the rate payable for level IV of the Executive Schedule;

(E), (F) [Redesignated]

but does not include—

(i) a position to which subchapter IV [5 USCS §§ 5341 et seq.] applies (relating to prevailing rate systems);

(ii) a position as to which a rate of pay is authorized under section 5377 [5 USCS § 5377] (relating to critical positions);

(iii) a position to which subchapter II applies (relating to the Executive Schedule);

(iv) a Senior Executive Service position under section 3132 [5 USCS § 3132], except for a position covered by subparagraph (C);

(v) a position in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service under section 3151 [5 USCS § 3151], except for a position covered by subparagraph (C);

(vi) a position in a system equivalent to the system in clause (iv), as determined by the President's Pay Agent designated under subsection (d); or

(vii) a position to which section 5376 [5 USCS § 5376] applies (relating to certain senior-level and scientific and professional positions), except for a position covered by subparagraph (C).

(2)

(A) Notwithstanding subsection (c)(4) or any other provision of this section, but subject to subparagraph (B) and paragraph (3), upon the request of the head of an Executive agency with respect to 1 or more categories of positions, the President may provide that each employee of such agency who holds a posi-

tion within such category, and within the particular locality involved, shall be entitled to receive comparability payments.

(B) A request by an agency head or exercise of authority by the President under subparagraph (A) shall cover—

(i) with respect to the positions under subparagraphs (A) through (C) of paragraph (1), all positions described in the subparagraph or subparagraphs involved (excluding any under clause (i), (ii), (iii), (iv), (v), (vi), or (vii) of such paragraph); and

(ii) with respect to positions under paragraph (1)(D), such positions as may be considered appropriate (excluding any under clause (i), (ii), (iii), (iv), (v), (vi), or (vii) of paragraph (1)).

(C) Notwithstanding subsection (c)(4) or any other provision of law, but subject to paragraph (3), in the case of a category with positions that are in more than 1 Executive agency, the President may, on his own initiative, provide that each employee who holds a position within such category, and in the locality involved, shall be entitled to receive comparability payments. No later than 30 days before an employee receives comparability payments under this subparagraph, the President or the President's designee shall submit a detailed report to the Congress justifying the reasons for the extension, including consideration of recruitment and retention rates and the expense of extending locality pay.

(3) Comparability payments under this subsection—

(A) may be paid only in any calendar year in which comparability payments under the preceding

provisions of this section are payable with respect to General Schedule positions within the same locality;

(B) shall take effect, within the locality involved, on the first day of the first applicable pay period commencing on or after such date as the President designates (except that no date may be designated which would require any retroactive payments), and shall remain in effect through the last day of the last applicable pay period commencing during that calendar year;

(C) shall be computed using the same percentage as is applicable, for the calendar year involved, with respect to General Schedule positions within the same locality; and

(D) shall be subject to the applicable limitation under subsection (g).

(i) The Office of Personnel Management may prescribe regulations, consistent with the provisions of this section, governing the payment of comparability payments to employees.

* * *

5 U.S.C. § 5701

§ 5701. Definitions

Except as otherwise provided in section 5707(d) [5 USCS § 5707(d)], for the purpose of this subchapter [5 USCS §§ 5701 et seq.]—

(1) "agency" means—

(A) an Executive agency;

(B) a military department;

(C) an office, agency, or other establishment in the legislative branch;

(D) an office, agency, or other establishment in the judicial branch; and

(E) the government of the District of Columbia;

but does not include

(i) a Government controlled corporation;

(ii) a Member of Congress; or

(iii) an office or committee of either House of Congress or of the two Houses;

(2) "employee" means an individual employed in or under an agency including an individual employed intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis and an individual serving without pay or at $ 1 a year;

(3) "subsistence" means lodging, meals, and other necessary expenses for the personal sustenance and comfort of the traveler;

(4) "per diem allowance" means a daily payment instead of actual expenses for subsistence and fees or tips to porters and stewards;

(5) "Government" means the Government of the United States and the government of the District of Columbia; and

(6) "continental United States" means the several States and the District of Columbia, but does not include Alaska or Hawaii.

* * *

5 U.S.C. § 8331(4)

§ 8331. Definitions

For the purpose of this subchapter [5 USCS §§ 8331 et seq.]—

(4) "average pay" means the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service or, in the case of an annuity under subsection (d) or (e)(1) of section 8341 of this title [5 USCS § 8341] based on service of less than 3 years, over the total service, with each rate weighted by the time it was in effect;

* * *

5 U.S.C. § 8339

§ 8339. Computation of annuity

(a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter [5 USCS §§ 8331 et seq.] is—

(1) 1 1/2 percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus

(2) 1 3/4 percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus

(3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years.

However, when it results in a larger annuity, 1 percent of his average pay plus $ 25 is substituted for the percentage specified by paragraph (1), (2), or (3) of this subsection, or any combination thereof.

(b) The annuity of a Congressional employee, or former Congressional employee, retiring under this subchapter [5 USCS §§ 8331 et seq.] is computed under subsection (a) of this section, except, if he has had—

(1) at least 5 years' service as a Congressional employee or Member or any combination thereof; and

(2) deductions withheld from his pay or has made deposit covering his last 5 years of civilian service;

his annuity is computed, with respect to his service as a Congressional employee, his military service not exceeding 5 years, and any Member service, by multiplying 2 1/2 percent of his average pay by the years of that service.

(c) The annuity of a Member, or former Member with title to Member annuity, retiring under this subchapter [5 USCS §§ 8331 et seq.] is computed under subsection (a) of this section, except, if he has had at least 5 years' service as a Member or Congressional employee or any combination thereof, his annuity is computed with respect to—

(1) his service as a Member and so much of his military service as is creditable for the purpose of this paragraph; and

(2) his Congressional employee service;

by multiplying 2 1/2 percent of his average pay by the years of that service.

(d) (1) The annuity of an employee retiring under section 8335(b) or 8336(c) of this title [5 USCS § 8335(b) or 8336(c)] is—

(A) 2 1/2 percent of his average pay multiplied by so much of his total service as does not exceed 20 years; plus

(B) 2 percent of his average pay multiplied by so much of his total service as exceeds 20 years.

(2) The annuity of an employee retiring under this subchapter [5 USCS §§ 8331 et seq.] who was employed by the Panama Canal Company or Canal Zone Government on September 30, 1979, is computed with respect to the period of continuous Panama Canal service from that date, disregarding any break in service of not more than 3 days, by adding—

(A) 2 1/2 percent of the employee's average pay multiplied by so much of that service as does not exceed 20 years; plus

(B) 2 percent of the employee's average pay multiplied by so much of that service as exceeds 20 years.

(3) The annuity of an employee retiring under this subchapter who is employed by the Panama Canal Commission at any time during the period beginning October 1, 1990, and ending December 31, 1999, is computed, with respect to any period of service with the Panama Canal Commission, by adding—

(A) 2 1/2 percent of the employee's average pay multiplied by so much of that service as does not exceed 20 years; plus

(B) 2 percent of the employee's average pay multiplied by so much of that service as exceeds 20 years.

(4) (A) In the case of an employee who has service as a law enforcement officer or firefighter to which paragraph (2) of this subsection applies, the annuity of that employee is increased by $ 8 for each full month of that service which is performed in the Republic of Panama.

(B) In the case of an employee retiring under this subchapter [5 USCS §§ 8331 et seq.] who—

(i) was employed as a law enforcement officer or firefighter by the Panama Canal Company or Canal Zone Government at any time during the period beginning March 31, 1979, and ending September 30, 1979; and

(ii) does not meet the age and service requirements of section 8336(c) of this title [5 USCS § 8336(c)];

the annuity of that employee is increased by $ 12 for each full month of that service which occurred before October 1, 1979.

(C) An annuity increase under this paragraph does not apply with respect to service performed after completion of 20 years of service (or any combination of service) as a law enforcement officer or firefighter.

(5) For the purpose of this subsection—

(A) "Panama Canal service" means—

(i) service as an employee of the Panama Canal Commission; or

(ii) service at a permanent duty station in the Canal Zone or Republic of Panama as an employee of an Executive agency conducting operations in the Canal Zone or Republic of Panama; and

(B) "Executive agency" includes the Smithsonian Institution.

(6) The annuity of an employee retiring under section 8336(j) of this title [5 USCS § 8336(j)] is computed under subsection (a) of this section, except that with respect to service on or after December 21, 1972, the employee's annuity is—

(A) 2 1/2 percent of the employee's average pay multiplied by so much of the employee's service on or after that date as does not exceed 20 years; plus

(B) 2 percent of the employee's average pay multiplied by so much of the employee's service on or after that date as exceeds 20 years.

(7) The annuity of an employee who is a judge of the United States Court of Appeals for the Armed Forces, or a former judge of such court, retiring under this subchapter [5 USCS §§ 8331 et seq.] is computed under subsection (a) of this section, except, with respect to his service as a judge of such court, his service as a Member, his congressional employee service, and his military service (not exceeding 5 years) creditable under section 8332 of this title [5 USCS § 8332], his annuity is computed by multiplying 2 1/2 percent of his average pay by the years of that service.

(e) The annuity of an employee retiring under section 8336(e) of this title [5 USCS § 8336(e)] is computed under subsection (a) of this section. That annuity may not be less than 50 percent of the average pay of the employee unless such employee has received, pursuant to section 8342 of this title [5 USCS § 8342], payment of the lump-sum credit attributable to deductions under section 8334(a) of this title [5 USCS § 8334(a)] during any period of

employment as an air traffic controller and such employee has not deposited in the Fund the amount received, with interest, pursuant to section 8334(d)(1) of this title [5 USCS § 8334(d)(1)].

(f) The annuity computed under subsections (a) through (e), (n), (q), (r), and (s) may not exceed 80 percent of—

(1) the average pay of the employee; or

(2) the greatest of—

(A) the final basic pay of the Member;

(B) the average pay of the Member; or

(C) the final basic pay of the appointive position of a former Member who elects to have his annuity computed or recomputed under section 8344(d)(1) of this title [5 USCS § 8344(d)(1)].

(g) The annuity of an employee or Member retiring under section 8337 of this title [5 USCS § 8337] is at least the smaller of—

(1) 40 percent of his average pay; or

(2) the sum obtained under subsections (a)-(c), (n), (q), (r), or (s) of this section after increasing his service of the type last performed by the period elapsing between the date of separation and the date he becomes 60 years of age.

However, if an employee or Member retiring under section 8337 of this title [5 USCS § 8337] is receiving retired pay or retainer pay for military service (except that specified in section 8332(c)(1) or (2) of this title [5 USCS § 8332(c)(1) or (2)]) or pension or compensation from the Department of Veterans Affairs in lieu of such retired or retainer pay, the annuity of that employee or Member shall be com-

puted under subsection (a), (b), (c), (n), (q), (r), or (s), as appropriate, excluding credit for military service from that computation. If the amount of the annuity so computed, plus the retired or retainer pay which is received, or which would be received but for the pension or compensation from the Department of Veterans Affairs in lieu of such retired or retainer pay, is less than the smaller of the annuity otherwise payable under paragraph (1) or (2) of this subsection, an amount equal to the difference shall be added to the annuity payable under subsection (a), (b), (c), (n), (q), (r), or (s), as appropriate.

(h) The annuity computed under subsections (a), (b), (d)(5), and (f) of this section for an employee retiring under section 8336(d), (h), (j), or (o) of this title [5 USCS § 8336(d), (h), (j), or (o)] is reduced by 1/6 of 1 percent for each full month the employee is under 55 years of age at the date of separation. The annuity computed under subsections (c) and (f) of this section for a Member retiring under the second or third sentence of section 8336(g) of this title [5 USCS § 8336(g)] or the third sentence of section 8338(b) of this title [5 USCS § 8338(b)] is reduced by 1/12 of 1 percent for each full month not in excess of 60 months, and 1/6 of 1 percent for each full month in excess of 60 months, the Member is under 60 years of age at the date of separation. The annuity computed under subsections (a), (d)(6), and (f) of this section for a judge of the United States Court of Appeals for the Armed Forces retiring under the second sentence of section 8336(k) of this title [5 USCS § 8336(k)] or the third sentence of section 8338(c) of this title [5 USCS § 8338(c)] is reduced by 1/2 of 1 percent for each full month not in excess of 60 months, and 1/6 of 1 percent for each full month in excess of 60 months,

the judge is under 60 years of age at the date of separation.

(i) For the purposes of subsections (a)-(h), (n), (q), (r), or (s), the total service of any employee or Member shall not include any period of civilian service after July 31, 1920, for which retirement deductions or deposits have not been made under section 8334(a) of this title [5 USCS § 8334(a)] unless—

(1) the employee or Member makes a deposit for such period as provided in section 8334(c) or (d)(1) of this title [5 USCS § 8334(c) or (d)(1)]; or

(2) no deposit is required for such service, as provided under section 8334(g) of this title [5 USCS § 8334(g)] or under any statute.

(j) (1) The annuity computed under subsections (a)-(i), (n), (q), (r), and (s) (or a portion of the annuity, if jointly designated for this purpose by the employee or Member and the spouse of the employee or Member under procedures prescribed by the Office of Personnel Management) for an employee or Member who is married at the time of retiring under this subchapter [5 USCS §§ 8331 et seq.] is reduced as provided in paragraph (4) of this subsection in order to provide a survivor annuity for the spouse under section 8341(b) of this title [5 USCS § 8341(b)], unless the employee or Member and the spouse jointly waive the spouse's right to a survivor annuity in a written election filed with the Office at the time that the employee or Member retires. Each such election shall be made in accordance with such requirements as the Office shall, by regulation, prescribe, and shall be irrevocable. The Office shall provide, by regulation, that an employee or Member may waive the survivor

annuity without the spouse's consent if the employee or Member establishes to the satisfaction of the Office—

(A) that the spouse's whereabouts cannot be determined, or

(B) that, due to exceptional circumstances, requiring the employee or Member to seek the spouse's consent would otherwise be inappropriate.

(2) If an employee or Member has a former spouse who is entitled to a survivor annuity as provided in section 8341(h) of this title [5 USCS § 8341(h)], the annuity of the employee or Member computed under subsections (a)-(i), (n), (q), (r), and (s) (or any designated portion of the annuity, in the event that the former spouse is entitled to less than 55 percent of the employee or Member's annuity) is reduced as provided in paragraph (4) of this subsection.

(3) An employee or Member who has a former spouse may elect, under procedures prescribed by the Office, to have the annuity computed under subsections (a)-(i), (n), (q), (r), and (s) or a portion thereof reduced as provided in paragraph (4) of this subsection in order to provide a survivor annuity for such former spouse under section 834(h) of this title [5 USCS § 834(h)], unless all rights to survivor benefits for such former spouse under this subchapter [5 USCS §§ 8331 et seq.] based on marriage to such employee or Member were waived under paragraph (1) of this subsection. An election under this paragraph shall be made at the time of retirement or, if later, within 2 years after the date on which the marriage of the former spouse to the employee or Member is dissolved, subject to a deposit in the Fund

by the retired employee or Member of an amount determined by the Office, as nearly as may be administratively feasible, to reflect the amount by which the annuity of such employee or Member would have been reduced if the election had been continuously in effect since the date the annuity commenced, plus interest. For the purposes of the preceding sentence, the annual rate of interest for each year during which the annuity would have been reduced if the election had been in effect since the date the annuity commenced shall be 6 percent. The Office shall, by regulation, provide for payment of the deposit required under this paragraph by a reduction in the annuity of the employee or Member. The reduction shall, to the extent practicable, be designed so that the present value of the future reduction is actuarially equivalent to the deposit required under this paragraph, except that the total reductions in the annuity of an employee or Member to pay deposits required by the provisions of this paragraph, paragraph (5), or subsection (k)(2) shall not exceed 25 percent of the annuity computed under subsections (a)-(i), (n), (q), (r), and (s), including adjustments under section 8340 [5 USCS § 8340]. The reduction, which shall be effective on the same date as the election under this paragraph, shall be permanent and unaffected by any future termination of the entitlement of the former spouse. Such reduction shall be independent of and in addition to the reduction required under the first sentence of this paragraph. All election under this paragraph—

(A) shall not be effective to the extent that it—

(i) conflicts with—

(I) any court order or decree referred to in subsection (h)(1) of section 8341 of this title [5 USCS

§ 8341], which was issued before the date of such election; or

(II) any agreement referred to in such subsection which was entered into before such date; or

(ii) would cause the total of survivor annuities payable under subsections (b), (d), (f), and (h) of section 8341 of this title [5 USCS § 8341] based on the service of the employee or Member to exceed 55 percent of the annuity to which the employee or Member is entitled under subsections (a)-(i), (n), (q), (r), and (s); and

(B) shall not be effective, in the case of an employee or Member who is then married, unless it is made with the spouse's written consent.

The Office shall provide by regulation that subparagraph (B) of this paragraph may be waived for either of the reasons set forth in the last sentence of paragraph (1) of this subsection. In the case of a retired employee or Member whose annuity is being reduced in order to provide a survivor annuity for a former spouse, an election to provide or increase a survivor annuity for any other former spouse (and to continue an appropriate reduction) may be made within the same period that, and subject to the same conditions under which, an election could be made under paragraph (5)(B) of this subsection for a current spouse (subject to the provisions of this paragraph relating to consent of a current spouse, if the retired employee or Member is then married). The opportunity to make an election under the preceding sentence is in addition to any opportunity otherwise afforded under this paragraph.

(4) In order to provide a survivor annuity or combination of survivor annuities under subsections

(b), (d), (f), and (h) of section 8341 of this title [5 USCS § 8341], the annuity of an employee or Member (or any designated portion or portions thereof) is reduced by 2 1/2 percent of the first $ 3,600 thereof plus 10 percent of so much thereof as exceeds $ 3,600.

(5)

(A) Any reduction in an annuity for the purpose of providing a survivor annuity for the current spouse of a retired employee or Member shall be terminated for each full month—

(i) after the death of the spouse, or

(ii) after the dissolution of the spouse's marriage to the employee or Member, except that an appropriate reduction shall be made thereafter if the spouse is entitled, as a former spouse, to a survivor annuity under section 8341(h) of this title [5 USCS § 8341(h)].

(B) Any reduction in an annuity for the purpose of providing a survivor annuity for a former spouse of a retired employee or Member shall be terminated for each full month after the former spouse remarries before reaching age 55 or dies. This reduction shall be replaced by an appropriate reduction or reductions under paragraph (4) of this subsection if the retired employee or Member has (i) another former spouse who is entitled to a survivor annuity under section 8341(h) of this title [5 USCS § 8341(h)], (ii) a current spouse to whom the employee or Member was married at the time of retirement and with respect to whom a survivor annuity was not jointly waived under paragraph (1) of this subsection, or (iii) a current spouse whom the employee or Member married after retirement and with respect to whom an election has been made

under subparagraph (C) of this paragraph or subsection (k)(2) of this section.

(C)

(i) Upon remarriage, a retired employee or Member who was married at the time of retirement (including an employee or Member whose annuity was not reduced to provide a survivor annuity for the employee or Member's spouse or former spouse as of the time of retirement) may irrevocably elect during such marriage, in a signed writing received by the Office within 2 years after such remarriage or, if later, within 2 years after the death or remarriage of any former spouse of such employee or Member who was entitled to a survivor annuity under section 8341(h) of this title [5 USCS § 8341(h)] (or of the last such surviving former spouse, if there was more than one), a reduction in the employee or Member's annuity under paragraph (4) of this subsection for the purpose of providing an annuity for such employee or Member's spouse in the event such spouse survives the employee or Member.

(ii) Such election and reduction shall be effective the first day of the second month after the election is received by the Office, but not less than 9 months after the date of the remarriage, and the retired employee or Member shall deposit in the Fund an amount determined by the Office of Personnel Management, as nearly as may be administratively feasible, to reflect the amount by which the annuity of such retired employee or Member would have been reduced if the election had been in effect since the date of retirement or, if later, the date the previous reduction in such retired employee or Member's annuity was terminated under subparagraph (A) or (B) of this paragraph, plus interest. For

the purposes of the preceding sentence, the annual rate of interest for each year during which an annuity would have been reduced if the election had been in effect on and after the applicable date referred to in such sentence shall be 6 percent.

(iii) The Office shall, by regulation, provide for payment of the deposit required under clause (ii) by a reduction in the annuity of the employee or Member. The reduction shall, to the extent practicable, be designed so that the present value of the future reduction is actuarially equivalent to the deposit required under clause (ii), except that total reductions in the annuity of an employee or Member to pay deposits required by the provisions of this paragraph or paragraph (3) shall not exceed 25 percent of the annuity computed under subsections (a)-(i), (n), (q), (r), and (s), including adjustments under section 8340 [5 USCS § 8340]. The reduction required by this clause, which shall be effective on the same date as the election under clause (i), shall be permanent and unaffected by any future termination of the marriage. Such reduction shall be independent of and in addition to the reduction required under clause (i).

(iv) Notwithstanding any other provision of this subparagraph, an election under this subparagraph may not be made for the purpose of providing an annuity in the case of a spouse by remarriage if such spouse was married to the employee or Member at the time of such employee or Member's retirement, and all rights to survivor benefits for such spouse under this subchapter [5 USCS §§ 8331 et seq.] based on marriage to such employee or Member were then waived under paragraph (1) of this subsection or a similar prior provision of law.

(v) An election to provide a survivor annuity to a person under this subparagraph—

(I) shall prospectively void any election made by the employee or Member under subsection (k)(1) of this section with respect to such person; or

(II) shall, if an election was made by the employee or Member under such subsection (k)(1) with respect to a different person, prospectively void such election if appropriate written application is made by such employee or Member at the time of making the election under this subparagraph.

(vi) The deposit provisions of clauses (ii) and (iii) of this subparagraph shall not apply if—

(I) the employee or Member makes an election under this subparagraph after having made an election under subsection (k)(1) of this section; and

(II) the election under such subsection (k)(1) becomes void under clause (v) of this subparagraph.

(k) (1) At the time of retiring under section 8336 or 8338 of this title [5 USCS § 8336 or 8338], an employee or Member who is found to be in good health by the Office may elect a reduced annuity instead of an annuity computed under subsections (a)-(i), (n), (q), (r), and (s) and name in writing an individual having an insurable interest in the employee or Member to receive an annuity under section 8341(c) of this title [5 USCS § 8341(c)] after the death of the retired employee or Member. The annuity of the employee or Member making the election is reduced by 10 percent, and by 5 percent for each full 5 years the individual named is younger than the retiring employee or Member. However, the

total reduction may not exceed 40 percent. An annuity which is reduced under this paragraph or any similar prior provision of law shall, effective the first day of the month following the death of the individual named under this paragraph, be recomputed and paid as if the annuity had not been so reduced. In the case of a married employee or Member, an election under this paragraph on behalf of the spouse may be made only if any right of such spouse to a survivor annuity based on the service of such employee or Member is waived in accordance with subsection (j)(1) of this section.

(2)

(A) An employee or Member, who is unmarried at the time of retiring under a provision of law which permits election of a reduced annuity with a survivor annuity payable to such employee or Member's spouse and who later marries, may irrevocably elect, in a signed writing received in the Office within 2 years after such employee or Member marries or, if later, within 2 years after the death or remarriage of any former spouse of such employee or Member who was entitled to a survivor annuity under section 8341(h) of this title [5 USCS § 8341(h)] (or of the last such surviving former spouse, if there was more than one), a reduction in the retired employee or Member's current annuity as provided in subsection (j) of this section.

(B) (i) The election and reduction shall take effect on the first day of the first month beginning after the expiration of the 9-month period beginning on the date of marriage. Any such election to provide a survivor annuity for a person—

(I) shall prospectively void any election made by the employee or Member under paragraph (1) of this subsection with respect to such person; or

(II) shall, if an election was made by the employee or Member under such paragraph with respect to a different person, prospectively void such election if appropriate written application is made by such employee or Member at the time of making the election under this paragraph.

(ii) The retired employee or Member shall deposit in the Fund an amount determined by the Office of Personnel Management, as nearly as may be administratively feasible, to reflect the amount by which the retired employee or Member's annuity would have been reduced under subsection (j)(4) of this section since the commencing date of the annuity, if the employee or Member had been married at the time of retirement and had elected to provide a survivor annuity at that time, plus interest. For the purposes of the preceding sentence, the annual rate of interest for each year during which the annuity would have been reduced if the election had been in effect since the date of the annuity commenced shall be 6 percent.

(C) The Office shall, by regulation, provide for payment of the deposit required under subparagraph (B)(ii) by a reduction in the annuity of the employee or Member. The reduction shall, to the extent practicable, be designed so that the present value of the future reduction is actuarially equivalent to the deposit required under subparagraph (B)(ii), except that total reductions in the annuity of an employee or Member to pay deposits required by this subsection or subsection (j)(3) shall not exceed 25 percent of the annuity computed under subsections (a) through (i),

(n), (q), and (r), including adjustments under section 8340 [5 USCS § 8340]. The reduction required by this subparagraph, which shall be effective on the same date as the election under subparagraph (A), shall be permanent and unaffected by any future termination of the marriage. Such reduction shall be independent of and in addition to the reduction required under subparagraph (A).

(D) Subparagraphs (B)(ii) and (C) of this paragraph shall not apply if—

(i) the employee or Member makes an election under this paragraph after having made an election under paragraph (1) of this subsection; and

(ii) the election under such paragraph (1) becomes void under subparagraph (B)(i) of this paragraph.

(l) The annuity computed under subsections (a)-(k), (n), (q), (r), and (s) for an employee who is a citizen of the United States is increased by $ 36 for each year of service in the employ of—

(1) the Alaska Engineering Commission, or The Alaska Railroad, in Alaska between March 12, 1914, and July 1, 1923; or

(2) the Isthmian Canal Commission, or the Panama Railroad Company, on the Isthmus of Panama between May 4, 1904, and April 1, 1914.

(m) In computing any annuity under subsections (a) through (e), (n), (q), (r), and (s), the total service of an employee who retires on an immediate annuity or dies leaving a survivor or survivors entitled to annuity includes, without regard to the limitations imposed by subsection (f) of this section, the days of unused sick leave to his credit under a formal leave

system, except that these days will not be counted in determining average pay or annuity eligibility under this subchapter [5 USCS §§ 8331 et seq.]. For the purpose of this subsection, in the case of any such employee who is excepted from subchapter I of chapter 63 of this title [5 USCS §§ 6301 et seq.] under section 6301(2)(x)-(xiii) of this title [5 USCS § 6301(2)(x)-(xiii)], the days of unused sick leave to his credit include any unused sick leave standing to his credit when he was excepted from such subchapter [5 USCS §§ 6301 et seq.].

(n) The annuity of an employee who is a Claims Court [Court of Federal Claims] judge, bankruptcy judge, or United States magistrate [United States magistrate judge] is computed, with respect to service as a Claims Court [Court of Federal Claims] judge, as a commissioner of the Court of Claims, as a referee in bankruptcy, as a bankruptcy judge, as a United States magistrate [United States magistrate judge], and as a United States commissioner, and with respect to the military service of any such individual (not exceeding 5 years) creditable under section 8332 of this title [5 USCS § 8332], by multiplying 2 1/2 percent of the individual's average pay by the years of that service.

(o) (1) (A) An employee or Member—

(i) who, at the time of retirement, is married, and

(ii) who notifies the Office at such time (in accordance with subsection (j)) that a survivor annuity under section 8341(b) of this title [5 USCS § 8341(b)] is not desired,

may, during the 18-month period beginning on the date of the retirement of such employee or

Member, elect to have a reduction under subsection (j) made in the annuity of the employee or Member (or in such portion thereof as the employee or Member may designate) in order to provide a survivor annuity for the spouse of such employee or Member.

(B) An employee or Member—

(i) who, at the time of retirement, is married, and

(ii) who at such time designates (in accordance with subsection (j)) that a limited portion of the annuity of such employee or Member is to be used as the base for a survivor annuity under section 8341(b) of this title [5 USCS § 8341(b)]

may, during the 18-month period beginning on the date of the retirement of such employee or Member, elect to have a greater portion of the annuity of such employee or Member so used.

(2) (A) An election under subparagraph (A) or (B) of paragraph (1) of this subsection shall not be considered effective unless the amount specified in subparagraph (B) of this paragraph is deposited into the Fund before the expiration of the applicable 18-month period under paragraph (1).

(B) The amount to be deposited with respect to an election under this subsection is an amount equal to the sum of—

(i) the additional cost to the System which is associated with providing a survivor annuity under subsection (b)(2) of this section and results from such election taking into account (I) the difference (for the period between the date on which the annuity of the participant or former participant commences and the date of the election) between the amount paid to such

participant or former participant under this subchapter [5 USCS §§ 8331 et seq.] and the amount which would have been paid if such election had been made at the time the participant or former participant applied for the annuity, and (II) the costs associated with providing for the later election; and

(ii) interest on the additional cost determined under clause (i) of this subparagraph computed using the interest rate specified or determined under section 8334(e) of this title [5 USCS § 8334(e)] for the calendar year in which the amount to be deposited is determined.

(3) An election by an employee or Member under this subsection voids prospectively any election previously made in the case of such employee or Member under subsection (j).

(4) An annuity which is reduced in connection with an election under this subsection shall be reduced by the same percentage reductions as were in effect at the time of the retirement of the employee or Member whose annuity is so reduced.

(5) Rights and obligations resulting from the election of a reduced annuity under this subsection shall be the same as the rights and obligations which would have resulted had the employee or Member involved elected such annuity at the time of retiring.

(6) The Office shall, on an annual basis, inform each employee or Member who is eligible to make an election under this subsection of the right to make such election and the procedures and deadlines applicable to such election.

(p)

(1) In computing an annuity under this subchapter [5 USCS §§ 8331 et seq.] for an employee whose

service includes service that was performed on a part-time basis—

(A) the average pay of the employee, to the extent that it includes pay for service performed in any position on a part-time basis, shall be determined by using the annual rate of basic pay that would be payable for full-time service in the position; and

(B) the benefit so computed shall then be multiplied by a fraction equal to the ratio which the employee's actual service, as determined by prorating an employee's total service to reflect the service that was performed on a part-time basis, bears to the total service that would be creditable for the employee if all of the service had been performed on a full-time basis.

(2) For the purpose of this subsection, employment on a part-time basis shall not be considered to include employment on a temporary or intermittent basis.

(3) In the administration of paragraph (1)—

(A) subparagraph (A) of such paragraph shall apply with respect to service performed before, on, or after April 7, 1986; and

(B) subparagraph (B) of such paragraph—

(i) shall apply with respect to that portion of any annuity which is attributable to service performed on or after April 7, 1986; and

(ii) shall not apply with respect to that portion of any annuity which is attributable to service performed before April 7, 1986.

(q) The annuity of a member of the Capitol Police, or former member of the Capitol Police, retiring

under this subchapter [5 USCS §§ 8331 et seq.] is computed in accordance with subsection (b), except that, in the case of a member who retires under section 8335(c) or 8336(m) [5 USCS § 8335(c) or 8336(m)], and who meets the requirements of subsection (b)(2), the annuity of such member is—

(1) 2 1/2 percent of the member's average pay multiplied by so much of such member's total service as does not exceed 20 years; plus

(2) 2 percent of the member's average pay multiplied by so much of such member's total service as exceeds 20 years.

(r) The annuity of a member of the Supreme Court Police, or former member of the Supreme Court Police, retiring under this subchapter [5 USCS §§ 8331 et seq.] is computed in accordance with subsection (d).

(s) The annuity of a Member who has served in a position in the executive branch for which the rate of basic pay was reduced for the duration of the service of the Member in that position to remove the impediment to the appointment of the Member imposed by article I, section 6, clause 2 of the Constitution, shall, subject to a deposit in the Fund as provided under section 8334(m) [5 USCS § 8334(m)], be computed as though the rate of basic pay which would otherwise have been in effect during that period of service had been in effect.

[(t)](s) (1) For purposes of this subsection, the term "physicians comparability allowance" refers to an amount described in section 8331(3)(H) [5 USCS § 8331(3)(H)].

(2) Except as otherwise provided in this subsection, no part of a physicians comparability allowance shall be treated as basic pay for purposes of any computation under this section unless, before the date of the separation on which entitlement to annuity is based, the separating individual has completed at least 15 years of service as a Government physician (whether performed before, on, or after the date of the enactment of this subsection).

(3) If the condition under paragraph (2) is met, then, any amounts received by the individual in the form of a physicians comparability allowance shall (for the purposes referred to in paragraph (2)) be treated as basic pay, but only to the extent that such amounts are attributable to service performed on or after the date of the enactment of this subsection, and only to the extent of the percentage allowable, which shall be determined as follows:

"If the total amount of service performed, on or after the date of the enactment of this subsection, as a Government physician is:	Then, the percentage allowable is:
Less than 2 years	0
At least 2 but less than 4 years	25
At least 4 but less than 6 years	50
At least 6 but less than 8 years	75
At least 8 years	100.

(4) Notwithstanding any other provision of this subsection, 100 percent of all amounts received as a physicians comparability allowance shall, to the extent attributable to service performed on or after the date of the enactment of this subsection, be

treated as basic pay (without regard to any of the preceding provisions of this subsection) for purposes of computing—

(A) an annuity under subsection (g); and

(B) a survivor annuity under section 8341 [5 USCS § 8341], if based on the service of an individual who dies before separating from service.

(u) The annuity of an employee retiring under this subchapter with service credited under section 8332(b)(17) [5 USCS § 8332(b)(17)] shall be reduced by the amount necessary to ensure that the present value of the annuity payable to the employee is actuarially equivalent to the present value of the annuity that would be payable to the employee under this subchapter if it were computed—

(1) on the basis of service that does not include service credited under section 8332(b)(17) [5 USCS § 8332(b)(17)]; and

(2) assuming the employee separated from service on the actual date of the separation of the employee.

The amount of the reduction shall be computed under regulations prescribed by the Office of Personnel Management for the administration of this subsection.

* * *

5 C.F.R. § 531.603

§ 531.603 Locality pay areas.

(a) Locality rates of pay under this subpart shall be payable to employees whose official worksites are located in the locality pay areas listed in paragraph (b) of this section.

(b) The following are locality pay areas for the purpose of this subpart:

(1) Atlanta-Sandy Springs-Gainesville, GA-AL—consisting of the Atlanta-Sandy Springs-Gainesville, GA-AL CSA;

(2) Boston-Worcester-Manchester, MA-NH-RI-ME—consisting of the Boston-Worcester-Manchester, MA-RI-NH CSA, plus Barnstable County, MA, and Berwick, Eliot, Kittery, South Berwick, and York towns in York County, ME;

(3) Buffalo-Niagara-Cattaraugus, NY—consisting of the Buffalo-Niagara-Cattaraugus, NY CSA;

(4) Chicago-Naperville-Michigan City, IL-IN-WI—consisting of the Chicago-Naperville-Michigan City, IL-IN-WI CSA;

(5) Cincinnati-Middletown-Wilmington, OH-KY-IN—consisting of the Cincinnati-Middletown-Wilmington, OH-KY-IN CSA;

(6) Cleveland-Akron-Elyria, OH—consisting of the Cleveland-Akron-Elyria, OH CSA;

(7) Columbus-Marion-Chillicothe, OH—consisting of the Columbus-Marion-Chillicothe, OH CSA;

(8) Dallas-Fort Worth, TX—consisting of the Dallas-Fort Worth, TX CSA;

(9) Dayton-Springfield-Greenville, OH—consisting of the Dayton-Springfield-Greenville, OH CSA;

(10) Denver-Aurora-Boulder, CO—consisting of the Denver-Aurora-Boulder, CO CSA, plus the Ft. Collins-Loveland, CO MSA;

(11) Detroit-Warren-Flint, MI—consisting of the Detroit-Warren-Flint, MI CSA, plus Lenawee County, MI;

(12) Hartford-West Hartford-Willimantic, CT-MA—consisting of the Hartford-West Hartford-Willimantic, CT CSA, plus the Springfield, MA MSA and New London County, CT;

(13) Houston-Baytown-Huntsville, TX—consisting of the Houston-Baytown-Huntsville, TX CSA;

(14) Huntsville-Decatur, AL—consisting of the Huntsville-Decatur, AL CSA;

(15) Indianapolis-Anderson-Columbus, IN—consisting of the Indianapolis-Anderson-Columbus, IN CSA, plus Grant County, IN;

(16) Los Angeles-Long Beach-Riverside, CA—consisting of the Los Angeles-Long Beach-Riverside, CA CSA, plus the Santa Barbara-Santa Maria-Goleta, CA MSA and all of Edwards Air Force Base, CA;

(17) Miami-Fort Lauderdale-Pompano Beach, FL—consisting of the Miami-Fort Lauderdale-Pompano Beach, FL MSA, plus Monroe County, FL;

(18) Milwaukee-Racine-Waukesha, WI—consisting of the Milwaukee-Racine-Waukesha, WI CSA;

(19) Minneapolis-St. Paul-St. Cloud, MN-WI—consisting of the Minneapolis-St. Paul-St. Cloud, MN-WI CSA;

(20) New York-Newark-Bridgeport, NY-NJ-CT-PA—consisting of the New York-Newark-Bridgeport, NY-NJ-CT-PA CSA, plus Monroe County, PA, Warren County, NJ, and all of Joint Base McGuire-Dix-Lakehurst;

(21) Philadelphia-Camden-Vineland, PA-NJ-DE-MD—consisting of the Philadelphia-Camden-Vineland, PA-NJ-DE-MD CSA, plus Kent County, DE, Atlantic County, NJ, and Cape May County, NJ;

(22) Phoenix-Mesa-Scottsdale, AZ—consisting of the Phoenix-Mesa-Scottsdale, AZ MSA;

(23) Pittsburgh-New Castle, PA—consisting of the Pittsburgh-New Castle, PA CSA;

(24) Portland-Vancouver-Beaverton, OR-WA—consisting of the Portland-Vancouver-Beaverton, OR-WA MSA, plus Marion County, OR, and Polk County, OR;

(25) Raleigh-Durham-Cary, NC—consisting of the Raleigh-Durham-Cary, NC CSA, plus the Fayetteville, NC MSA, the Goldsboro, NC MSA, and the Federal Correctional Complex Butner, NC;

(26) Richmond, VA—consisting of the Richmond, VA MSA;

(27) Sacramento-Arden-Arcade-Yuba City, CA-NV—consisting of the Sacramento-Arden-Arcade-Yuba City, CA-NV CSA, plus Carson City, NV;

(28) San Diego-Carlsbad-San Marcos, CA—consisting of the San Diego-Carlsbad-San Marcos, CA MSA;

(29) San Jose-San Francisco-Oakland, CA—consisting of the San Jose-San Francisco-Oakland, CA CSA, plus the Salinas, CA MSA and San Joaquin County, CA;

(30) Seattle-Tacoma-Olympia, WA—consisting of the Seattle-Tacoma-Olympia, WA CSA, plus Whatcom County, WA;

(31) Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA—consisting of the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV CSA, plus the Hagerstown-Martinsburg, MD-WV MSA, the York-Hanover-Gettysburg, PA CSA, and King George County, VA; and

(32) Rest of U.S.—consisting of those portions of the continental United States not located within another locality pay area.

* * *

5 C.F.R. § 531.604

§ 531.604 Determining an employee's locality rate.

(a) An annual locality rate consists of a scheduled annual rate of pay plus an applicable locality payment (representing an annual dollar amount), as determined under paragraph (b) of this section.

(b) An agency determines an employee's locality rate by—

(1) Determining the employee's official worksite consistent with the rules in § 531.605;

(2) Determining the locality pay area in which the employee's official worksite is located, consistent with the locality pay areas established in § 531.603;

(3) Identifying the locality pay percentage in effect in the applicable locality pay area;

(4) Increasing the employee's scheduled annual rate of pay by the applicable locality pay percentage and rounding the result to the nearest whole dollar

(counting 50 cents and over as the next higher dollar); and

(5) Applying any applicable limitation as described in § 531.606.

(c) A locality rate may be expressed as an hourly, daily, weekly, or biweekly rate, as provided in § 531.607.

FEDERAL REGISTER

Vol. 71, No. 247

Presidential Documents

PRESIDENT OF THE UNITED STATES
Executive Order 13420 of December 21, 2006
Title 3—The President Adjustments of
Certain Rates of Pay
Part VI—71 FR 77571

DATE: Tuesday, December 26, 2006

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the laws cited herein, it is hereby ordered as follows:

Section 1. *Statutory Pay Systems*. The rates of basic pay or salaries of the statutory pay systems (as defined in 5 U.S.C. 5302(1)), as adjusted under 5 U.S.C. 5303(a), are set forth on the schedules attached hereto and made a part hereof:

(a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;

(b) The Foreign Service Schedule (22 U.S.C. 3963) at Schedule 2; and

(c) The schedules for the Veterans Health Administration of the Department of Veterans Affairs (38 U.S.C. 7306, 7404; section 301(a) of Public Law 102-40) at Schedule 3.

Sec. 2. *Senior Executive Service*. The ranges of rates of basic pay for senior executives in the Senior Executive Service, as established pursuant to 5 U.S.C. 5382, are set forth on Schedule 4 attached hereto and made a part hereof.

Sec. 3. *Certain Executive, Legislative, and Judicial Salaries.* The rates of basic pay or salaries for the following offices and positions are set forth on the schedules attached hereto and made a part hereof:

(a) The Executive Schedule (5 U.S.C. 5312-5318) at Schedule 5;

(b) The Vice President (3 U.S.C. 104) and the Congress (2 U.S.C. 31, and section 137 of Public Law 109-289, division B, as amended by section 7 of Public Law 109-383) at Schedule 6; and

(c) Justices and judges (28 U.S.C. 5, 44(d), 135, 252, and 461(a); section 140 of Public Law 97-92), at Schedule 7.

Sec. 4. *Uniformed Services.* Pursuant to section 601(a)-(c) of Public Law 109-364, the rates of monthly basic pay (37 U.S.C. 203(a)) for members of the uniformed services, as adjusted under 37 U.S.C. 1009, and the rate of monthly cadet or midshipman pay (37 U.S.C. 203(c)) are set forth on Schedule 8 attached hereto and made a part hereof.

Sec. 5. *Locality-Based Comparability Payments.*

(a) Pursuant to 5 U.S.C. 5304a, locality-based comparability payments shall be paid in accordance with Schedule 9 attached hereto and made a part hereof.

(b) The Director of the Office of Personnel Management shall take such actions as may be necessary to implement these payments and to publish appropriate notice of such payments in the Federal Register .

Sec. 6. *Administrative Law Judges.* The rates of basic pay for administrative law judges, as adjusted under 5 U.S.C. 5372(b)(4), are set forth on Schedule 10 attached hereto and made a part hereof.

Sec. 7. *Effective Dates.* Rates for the Congress, under Schedule 6, are effective on February 16, 2007. Schedule 7 reflects continuation of the pay rates in effect as of the first day of the applicable pay period beginning on or after January 1, 2006. Schedule 8 is effective on January 1, 2007. The other schedules contained herein are effective on the first day of the first applicable pay period beginning on or after January 1, 2007. [*77572]

Sec. 8. *Prior Order Superseded.* Executive Order 13393 of December 22, 2005, is superseded.

S George W. Bush
THE WHITE HOUSE,

December 21, 2006.

FEDERAL REGISTER

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S George W. Bush
THE WHITE HOUSE,

December 21, 2006.

No. 09-949

In the Supreme Court of the United States

JOYCE K. MATSUO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employees Pay Comparability Act of 1990, 5 U.S.C. 5301 *et seq.*, violates the fundamental right to travel or principles of equal protection.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-66a) is reported at 586 F.3d 1180. The opinions of the district court (Pet. App. 1a-29a, 30a-57a) are reported at 416 F. Supp. 2d 982 and 532 F. Supp. 2d 1238.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2009. The petition for a writ of certiorari was filed on February 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. No. 101-509, Tit. V, § 529, 104 Stat. 1427 (5 U.S.C. 5301 *et seq.*), to establish a general program of supplemental location-

based pay for federal employees. Under that "locality pay" program, an employee's base General Schedule rate of pay is supplemented with a payment that varies according to the disparity between federal and non-federal wages in the employee's local pay area.* The exact percentage for each area is set by the President each year after considering the views and recommendations of the Federal Salary Council. 5 U.S.C. 5304(d) and (e). Locality pay is subject to federal income tax and is deemed "part of basic pay for purposes of retirement." 5 U.S.C. 5304(c)(2).

As originally enacted, FEPCA authorized locality pay only for federal employees in the "continental United States," a term defined to exclude Alaska, Hawaii, and federal territories and possessions. See 5 U.S.C. 5304(f)(1)(A); 5 U.S.C. 5701(6) (definition of "continental United States"). Since 1948, federal employees in Alaska, Hawaii, and federal territories and possessions have received cost-of-living allowance (COLA) benefits to offset the high cost of living associated with those locations. See Exec. Order No. 10,000, 13 Fed. Reg. 5455 (1948); 5 U.S.C. 5941(a). Unlike locality pay, COLA benefits are not subject to federal income tax, 26 U.S.C. 912(2), nor are they included in the calculation of employees' retirement benefits.

In October 2009, Congress amended FEPCA to provide that, after a phase-in period, federal employees in Alaska and Hawaii will receive locality pay instead of

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* The locality pay program affects only "General Schedule" (*i.e.*, white-collar) federal employees. Employees subject to the Federal Wage System do not receive locality pay or other cost-of-living allowances. Compare 5 U.S.C. 5104 (typical General-Schedule employee duties), with 5 U.S.C. 5342(a)(2) (employees covered by Federal Wage System).

COLA benefits. Pet. App. 66a n.9; see Non-Foreign Area Retirement Equity Assurance Act of 2009 (2009 Amendment), Pub. L. No. 111-84, Tit. XIX, Subtit. B, § 1912, 123 Stat. 2619.

2. Petitioners, a group of federal employees, brought this action in 2005 in the District of Hawaii on behalf of two classes: (1) all current and former federal employees who work, or have worked, in Alaska or Hawaii without receiving locality pay, and (2) all federal employees who live in the continental United States and could not take a federal job in Alaska or Hawaii without losing locality pay. Pet. App. 60a; see *id.* at 2a-3a. Petitioners alleged that the statutory exclusion of Alaska and Hawaii employees from the locality pay system constituted an unconstitutional restriction on the fundamental right to travel, as well as a violation of equal protection and substantive due process principles. *Id.* at 2a. In addition, petitioners asserted a right to recover back pay and other damages based on the exclusion of COLA benefits from the computation of federal retirement annuities. *Id.* at 2a-3a. The district court dismissed plaintiffs' claims for money damages and back pay for lack of jurisdiction, *id.* at 19a-21a, and it granted summary judgment for the government on the merits of the constitutional claims, *id.* at 30a-57a.

3. The court of appeals affirmed. Pet. App. 58a-66a. The court explained that, as to employees in Alaska and Hawaii, the FEPCA's limitation of locality pay to the continental United States did not implicate the constitutional right to travel. The court observed that "[t]he Act imposes no travel penalty on them; if anything it imposes a penalty for staying put. In fact, the Act encourages these employees to travel by providing superior pay in the 48 contiguous states." *Id.* at 61a-62a.

As to the employees residing in the continental United States, the court of appeals acknowledged that "traveling would arguably trigger a penalty" because they "would lose locality pay if they moved to Alaska or Hawaii and continued to work for the federal government." Pet. App. 62a. The court recognized that "there is, of course, no constitutional right to federal employment wherever one chooses to live," and that "[n]othing prevents [petitioners] from taking a locality-paying private-sector job." *Id.* at 62a n.4. For those reasons, the court observed, it was "not clear that these plaintiffs are suffering a cognizable injury at all." *Ibid.*

Nonetheless, the court of appeals analyzed and rejected petitioners' right-to-travel claim on the merits, explaining that "not everything that deters travel burdens the fundamental right to travel." Pet. App. 62a-63a. Because FEPCA did not "prevent[] citizens from entering or leaving" a State; treat persons temporarily present in a State as "'unfriendly aliens' rather than as 'welcome visitors'"; "discriminat[e] against citizens of other states who elect to become permanent residents" of a State; or purport to authorize States to violate one of those strictures, the court of appeals reasoned, "the Act doesn't violate the right to travel" as that right was described by this Court in *Saenz* v. *Roe*, 526 U.S. 489 (1999). Pet. App. 63a (quoting *Saenz*, 526 U.S. at 500).

The court of appeals next rejected petitioners' argument that the right to travel extends beyond *Saenz* to guarantee the right to be "provided with the same federal benefits after moving as before." Pet. App. 63a. That contention, the court explained, is foreclosed by this Court's decision in *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam), which found no violation of the right to travel when a resident of Connecticut lost his social-

security benefits because he moved to Puerto Rico. Pet. App. 64a. If the Constitution required Congress to ensure nationwide uniformity in the distribution of federal benefits, the court noted, "choices Congress makes every day—where to build a military base, how much to allocate a state in highway funds, whether to provide a tax credit for this or that disaster area—would trigger strict scrutiny." *Id.* at 65a.

Finally, the court of appeals addressed petitioners' contention that FEPCA's exclusion of employees in Alaska and Hawaii lacked a rational basis. Pet. App. 65a-66a. Noting that petitioners had abandoned their equal protection claim by failing to raise it on appeal, *id.* at 66a n.8, the court observed that there is no "free-floating requirement that all congressional action be rational," and it explained that "federal employees can have no judicially enforceable interest in pay at a particular rate," *id.* at 66a. In any event, the court reasoned, "the Act clearly satisfies rational-basis scrutiny for the reasons stated by the district court." *Id.* at 66a n.8; see *id.* at 50a-56a.

In a footnote, the court of appeals observed that, while the case was pending, Congress had amended FEPCA to extend locality pay to federal employees in Alaska and Hawaii. Pet. App. 66a n.9. The court did not consider whether that amendment mooted the case.

ARGUMENT

The court of appeals correctly held that the statutory program of locality pay for federal employees in the continental United States does not violate the fundamental right to interstate travel. Its decision does not conflict with any decision of this Court or any other court of appeals. In addition, because Congress has recently

amended the statute to eliminate the feature of the locality-pay program to which petitioners object, this case presents no issue of prospective importance. Further review is not warranted.

1. According to petitioners (Pet. i-ii), this case presents the question whether Congress may discriminate between federal employees in different States in the allocation of federal pay and benefits. As the court of appeals noted, however, Congress has now eliminated the disparity of which petitioners complain by enacting legislation to extend the locality-pay program to Alaska and Hawaii. Pet. App. 66a n.9. After a phase-in period, federal employees in Alaska and Hawaii will receive locality pay instead of COLA benefits in the same manner as employees in the continental United States. See 2009 Amendment § 1914, 123 Stat. 2621 (prescribing schedule under which the transition to locality pay will be fully effective by calendar year 2012).

That amendment grants petitioners the very relief that they seek in this litigation. At the time of the complaint, FEPCA provided that "each General Schedule position (excluding any outside the continental United States, as defined in section 5701(6)) shall be included with a pay locality." 5 U.S.C. 5304(f)(1)(A). Petitioners brought this action to challenge the constitutionality of the "continental United States" limitation. The 2009 Amendment repeals that limitation and provides that "each General Schedule position *in the United States*, as defined under section 5921(4), * * * shall be included within a pay locality." 2009 Amendment § 1912(a)(1), 123 Stat. 2619 (emphasis added); see 5 U.S.C. 5921(4) ("'United States,' when used in a geographical sense, means the several States and the District of Columbia.").

Nothing more remains of petitioners' claims. Although petitioners originally sought damages and back pay, the district court dismissed those claims for lack of jurisdiction, Pet. App. 19a-21a, and an appeal of that aspect of its decision was dismissed, 191 Fed. Appx. 961 (Fed. Cir. 2006). Once the transition to locality pay is fully implemented in 2012, petitioners will have no further personal stake in the resolution of the constitutional claims they assert, and their remaining claims will become moot. Because the 2009 Amendment deprives this case of any prospective significance, this Court's review is not warranted.

2. On the merits, the court of appeals correctly held that Congress's discretionary choice to provide a particular form of supplemental compensation for federal employees in certain States rather than others does not violate the Constitution.

Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals. Instead, they contend (Pet. 12-21) that the court below erred in refusing to extend the constitutional right to travel recognized by this Court in *Saenz* v. *Roe*, 526 U.S. 489 (1999), to prohibit Congress from discriminating among States in the allocation of federal benefits.

That question is not presented by this case. Petitioners brought this action not as private citizens aggrieved by the distribution of public benefits but as federal employees dissatisfied with their compensation. The distinction is material because the employment relationship is consensual: petitioners are free to leave federal employment if the pay and benefits they receive are unsatisfactory. And by the same token, nothing in the Constitution requires Congress to guarantee that federal employment will be available to petitioners on the same

terms everywhere in the country. As the court of appeals observed, there is "no constitutional right to federal employment wherever one chooses to live." Pet. App. 62a n.4; cf. *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976) (per curiam). In the absence of invidious discrimination on the basis of race or other suspect class—which petitioners do not allege here—it is Congress's prerogative to determine whether attracting and retaining a suitable federal workforce in Alaska and Hawaii requires more, less, or the same pay and benefits as required in California, Virginia, or Guam. The right to interstate travel has no bearing on that question.

3. In any event, the court of appeals also correctly held that petitioners' right-to-travel claim fails on its own terms. Petitioners do not dispute (Pet. 18) that their claim is unlike anything recognized by this Court in *Saenz*. See 526 U.S. at 500 (discussing the recognized components of the right to travel). Instead, they contend (Pet. 14) that the constitutional right to travel should be extended to bar Congress from "singling out citizens for denial of benefits exclusively because of the state in which they reside."

As the court of appeals recognized, that argument is foreclosed by this Court's decision in *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam). The plaintiff in that case, who lost his Social Security benefits upon moving to Puerto Rico from Connecticut, brought suit challenging the exclusion of residents of Puerto Rico from the Social Security program as a violation of the constitutional right to travel. *Id.* at 2-3. This Court rejected that claim, explaining that the "right to travel" does not imply that a citizen who receives federal benefits by virtue of his residence in one state is entitled to keep those

benefits upon moving to another. *Id.* at 4. The same principle forecloses petitioners' claim here. As the court of appeals explained, "*Torres* teaches that the right to travel permits the federal government to put new migrants to a state or territory on the same footing as that of long-established citizens. That is all that would occur should [petitioners] move from the 48 contiguous states to Alaska or Hawaii." Pet. App. 65a.

Petitioners attempt (Pet. 19) to distinguish *Torres* on the ground that the case involved travel to Puerto Rico, a federal territory rather than a State. But as the court of appeals noted in rejecting that distinction, the Court in *Torres* expressly assumed "that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union." Pet. App. 64a n.7 (quoting *Torres*, 435 U.S. at 4 n.6).

4. Finally, petitioners argue (Pet. 21-25) that FEPCA's exclusion of Alaska and Hawaii from the locality pay program violates the equal protection component of the Fifth Amendment. Petitioners forfeited that claim by failing to present it to the court of appeals. Pet. App. 66a n.8 (noting petitioners' failure to preserve their equal protection claim); see *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Although petitioners now contend that they did raise an equal protection argument in the court of appeals, their appellate briefs pressed no equal protection argument distinct from their right-to-travel claim. Instead, petitioners argued that FEPCA failed rational-basis scrutiny under what they referred to as "the most relaxed standard of review applied in any of the Su-

preme Court['s] right-to-travel cases." Pet. C.A. Br. 49. That is the argument that the court of appeals addressed and rejected, explaining that there is no "free-floating" rational basis constraint on Congress's decisions regarding federal pay. Pet. App. 66a. "Without a right to government employment in the first place, which plaintiffs don't argue exists, federal employees can have no judicially enforceable interest in pay at a particular rate." *Ibid.*

In any event, as the court of appeals noted, FEPCA "clearly satisfies rational-basis scrutiny." Pet. App. 66a n.8. By the time FEPCA was enacted in 1990, government employees in Alaska and Hawaii had already been receiving tax-free COLAs under the COLA program for more than four decades. As the district court explained, "Congress rationally could have decided [that] employees who received this tax free allowance did not also need to receive locality pay." *Id.* at 54a. In addition, Congress "rationally may have determined locality pay was not needed in [Alaska and Hawaii] to recruit and retain employees." *Id.* at 56a. Either of those justifications would be sufficient by itself to satisfy the requirements of rational-basis review; together they leave no doubt that Congress acted well within its constitutional authority. See *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (plaintiffs "attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'") (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

No. 09-949

Supreme Court, U.S.
FILED
JUN 1 - 2010
OFFICE OF THE CLERK

IN THE

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JOYCE K. MATSUO, *et al.*,
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v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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ARGUMENT

The United States, in its opposition brief, makes a number of unsubstantiated and, in some cases, false arguments that cannot be left unaddressed.

The Government contends that review of Petitioners' claim is unnecessary because of the enactment of a 2009 amendment to the Federal Employees' Pay Comparability Act ("FEPCA") which provides that, after a three-year phase in period, Federal employees in Alaska and Hawaii will receive locality pay. According to the Government, once this legis-

lation is fully implemented in 2012, "petitioners will have no further personal stake in the resolution of the constitutional claims they assert, and their remaining claims will become moot." Opp. Brief 7. These statements are both factually and legally incorrect.

The Government's assertion that Petitioners have no claim for damages and back pay arising from the violation of their constitutional rights is simply false, as is the Government's statement that "an appeal of that aspect of [the District Court's] decision was dismissed." Opp. Brief 7. To the contrary, the Petitioners in this case seek damages emanating from the Government's unconstitutional scheme of denying locality pay based exclusively on the state in which one resides. Indeed, in its attempt to transfer jurisdiction from the District Court to the Court of Claims, the Government found that the damages resulting from these violations for current and former employees of the Government residing in Hawaii and Alaska were easily quantifiable, estimating that "nearly half the putative class of Alaskan and Hawaiian federal employees [] would have claims over $10,000." App. 3a. The District Court rejected the Government's attempt to transfer the case not because no damages are being sought for the constitutional violations, but because, under well settled law, the Court of Claims does not have jurisdiction over Federal employees' constitutional claims, even where they seek damages, if the underlying nature of the case is a challenge that a statute is unconstitutional. As the District Court explained, "the Court of Claims does not possess exclusive jurisdiction over a suit simply because the requested non-monetary relief may form the basis for a later monetary judgment against the Government." App. 8a. Accordingly, if the FEPCA

exclusion is found to be unconstitutional, the Petitioners in Hawaii and Alaska would be entitled to damages which would include the difference between what they were paid and what they would have been paid had they received the locality pay mandated by the statute.

It is also important to note that it was the ***Government*** that appealed the District Court's decision regarding jurisdiction, and it was the Government's decision not to pursue that appeal that led to its voluntary dismissal. *See* District Court's Docket Entry Nos. 33 & 36. For the Government now to imply that it was Petitioners who appealed a decision denying damages mischaracterizes the record. Petitioners have always sought – and continue to seek – damages for the Government's unconstitutional denial of locality pay to current and former Federal employees residing in Hawaii or Alaska.

In light of the foregoing, it is disingenuous of the Government to argue that this Court's review of the significant constitutional issues presented by this case is unwarranted merely because Congress has seen fit to amend its flawed statute. At the outset, the 2009 amendment did not "deprive this case of any prospective significance," as argued by the Government (Opp. Brief 7), for the simple reason that it will not even be fully implemented until 2012, and it does nothing to remedy the monetary damages suffered by the Petitioners who were, and are, employed in Alaska and Hawaii prior to this date.

Indeed, this Court has held that the repeal or amendment of a statute while an appeal is pending from a decision addressing its constitutionality does not necessarily divest it of authority to rule on the constitutional questions implicated by the appeal.

See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288-89 (1982) (concluding that the appeal from a case challenging the constitutionality of an ordinance was not mooted by its amendment while the case was pending in the Court of Appeals). This is certainly true in the instant case because the amendment to FEPCA did not retroactively cure the damages suffered by the Petitioners as a result of its original enactment and application. For instance, in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 n.1 (1996), this Court rejected the notion that the repeal of a statute imposing a tax that violated the Commerce Clause divested the Court of jurisdiction to consider the constitutionality of the tax, for the simple reason that the repeal had no retroactive effect, and a "justiciable controversy" therefore remained with respect to the tax years at issue in the litigation. *See also Powell v. McCormack*, 395 U.S. 486, 498-500 (1969) (holding that petitioner's claims alleging that he was deprived of his seat in Congress by virtue of an unconstitutional Congressional resolution was not rendered moot by his subsequent seating where his claim for lost salary remained unresolved). Accordingly, the Government's attempt to deflect this Court's attention from the significant constitutional issues raised by this petition based upon the 2009 amendment to FEPCA is unfounded, and should be rejected.

The Government also argues that this case does not warrant this Court's consideration because the Petitioners "are free to leave federal employment if the pay and benefits they receive are unsatisfactory." Opp. Brief 7. Citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the Government further contends that "nothing in the Constitution requires Congress to guarantee that federal employ-

ment will be available to petitioners on the same terms everywhere in the country." Opp. Brief 7-8. These arguments completely miss the point of the Petitioners' allegations. Indeed, the *Murgia* case ***supports***, rather than undermines, the Petitioners' position in this case.

Petitioners are not claiming, nor have they ever claimed, that they enjoy heightened constitutional protection merely by virtue of their Federal employment. As this Court has repeatedly held, however, a public employee does not ***relinquish*** Federal constitutional rights "just by reason of his or her employment." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967) (recognizing the established principle that public employees may not be required to surrender their constitutional rights as a condition of employment). This principle was affirmed in *Murgia*, which simply held that an age-based classification did not offend the equal protection rights of the public employees to whom it was applied. In reaching this conclusion, the Court provided specific examples of legislative classifications that, if applied to public employees, ***would*** be subject to heightened judicial scrutiny because they infringed upon "fundamental" rights, ***including*** the right to interstate travel. *Murgia*, 427 U.S. at 312 n.3.

Accordingly, even though the Federal government may exercise discretion in establishing the terms and conditions of its employees, it cannot do so in a manner that violates their constitutional rights. The Government's suggestion that Petitioners' allegations should not be heard because they are "free to leave" their employment is therefore entirely unfounded. Surely the Government would not argue that, be-

cause no Federal employee is constitutionally entitled to any particular benefit of employment, it is entitled to provide such benefits in a racially discriminatory manner. By the same token, the Government cannot, and should not, distinguish among its employees in a way that burdens their constitutional right to travel.

In opposing Petitioners' claims, the Government also argues that Petitioners "forfeited" their equal protection claims before the Court of Appeals because "their appellate briefs pressed no equal protection argument distinct from their right-to-travel claim." Opp. Brief 9. As Petitioners pointed out in their opening brief, however, they explicitly argued in their appellate briefs that FEPCA's exclusions offended the Equal Protection clause. *See* Petition for a Writ of Certiorari at 21-22. Moreover, the Court of Appeals, while erroneously concluding that the Petitioners did not raise an equal protection claim in their briefs, nonetheless addressed this argument by concluding that FEPCA "clearly satisfies rational-basis scrutiny for the reasons stated by the district court." App. 66a n.8.

The Government has neither disputed these points nor cited any authority that would preclude this Court from considering this important question. In the only case cited by the Government to support its argument on this issue – *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) – the Court refused to consider non-constitutional grounds for affirming the lower court's decision where neither party raised any such arguments before the District Court ***or*** the Court of Appeals, and neither court's decision addressed any non-constitutional questions. *Id.* at 7-8. The Court's holding in *Zobrest* does not preclude this Court from considering Petitioners' equal protection

arguments, insofar as Petitioners clearly raised this claim before both the District Court and the Court of Appeals, and this issue was addressed in both courts' decisions. Indeed, in *United States v. Williams*, 504 U.S. 36, 41 (1992), this Court clarified that its "traditional rule" precludes certiorari review ***only*** when "the question presented was not pressed or passed upon below." The Court emphasized that this rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon" by the lower courts. *Id.* As demonstrated, Petitioners have clearly satisfied this test with respect to preserving their equal protection arguments for certiorari review.

Finally, the Government has argued (Opp. Brief 10) that FEPCA "clearly" survives the rational basis standard as articulated by this Court in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), under which those challenging the constitutionality of a statute "have the burden 'to negative every conceivable basis which might support it.'" *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Remarkably, by merely parroting the Court of Appeals' conclusion on this point, the Government failed to rebut – and indeed completely ignored – Petitioners' argument that FEPCA's exclusion of Federal employees residing in Alaska and Hawaii does not survive the less deferential rational basis standard of review that has ***actually been applied*** by this Court to other residency-based statutes. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618-23 (1985); *Zobel v. Williams*, 457 U.S. 55, 60-65 (1982). The Government's silence on this point can only be construed as an implicit admission that the challenged exclusion

would not survive scrutiny under this well-established line of cases.

CONCLUSION

While each of the foregoing arguments by the Government is easily rebutted, it is important to note that the underlying significance of the questions presented in this case has not been denied. If left undisturbed, the lower courts' rulings will leave Congress free to deny Federal benefits to Federal citizens based solely, and explicitly, on the state in which they reside. The eleventh-hour amendment of FEPCA does not resolve this constitutional dilemma, nor does it divest this case of its fundamental importance. Only by granting certiorari review, and reversing the Court of Appeals' ruling, can this Court correct this glaring hole in Federal constitutional jurisprudence.

Respectfully submitted,

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June 1, 2010